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2686
No. 12826

United States
Court of Appeals
for the Ninth Circuit.

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California
Central Division.

FILED

MAY 17 1951

PAUL M. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States for the Southern District of California, Central Division
Civil Action No. 9621-BH

LAWRENCE BARKER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF FEDERAL
INCOME AND VICTORY TAXES

Comes Now the Plaintiff, and for his cause of action against the defendant alleges and states, as follows:

1. This is an action for the refund of Federal Income and Victory Taxes paid by Plaintiff in the amount of \$1,818.98. This action arises under Section 111 of the Internal Revenue Code and also Section 24(20) of the Judicial Code, as amended.

2. Plaintiff has been at all times mentioned herein, and now is, a resident of the City of Los Angeles, County of Los Angeles, State of California.

3. On September 30, 1943, Plaintiff transferred to Lawrence Barker, Inc., a California corporation, and said Lawrence Barker, Inc., received from Plaintiff, thirty (30) shares of the capital stock of said Lawrence Barker, Inc. Said Lawrence Barker, Inc., paid to plaintiff the sum of \$5,000.00 for the transfer of said thirty (30) shares of stock.

Payment of said sum of \$5,000.00 was made by Lawrence Barker, Inc., to Plaintiff by way of crediting \$5,000.00 against Plaintiff's indebtedness to Lawrence Barker, Inc. [2*]

4. The thirty (30) shares of capital stock of Lawrence Barker, Inc., so transferred, as hereinbefore alleged in paragraph 3 hereof, were acquired by Plaintiff on or about the 28th day of December, 1923. As consideration for the original issuance to him of said thirty (30) shares of the capital stock of Lawrence Barker, Inc., Plaintiff paid a price of \$6,580.50. Said price of \$6,580.50 was paid by Plaintiff in the form of property consisting of common stock of Barker Brothers, Inc., a California corporation. On or about the 28th day of December, 1923, the common stock of Barker Brothers, Inc., transferred by Plaintiff in exchange for the aforementioned thirty (30) shares of the capital stock of Lawrence Barker, Inc., had a fair market value of \$6,580.50. The aforementioned thirty (30) shares of the capital stock of Lawrence Barker, Inc., cost the Plaintiff \$6,580.50, or \$219.35 per share.

5. The facts and circumstances under which Plaintiff acquired the aforesaid thirty (30) shares of Lawrence Barker, Inc., stock are fully set forth in the claim for refund of Federal Income and Victory Taxes which Plaintiff executed and duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at Los Angeles, California, on March 15, 1947. A true

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

copy of said claim for refund is attached hereto, marked Exhibit "I," and incorporated herein by reference as if fully set forth herein. Said thirty (30) shares of Lawrence Barker, Inc., stock are a part of the twenty thousand (20,000) shares of Lawrence Barker, Inc., stock received by the Lawrence Barker Interests, including Plaintiff, in exchange for their common stock in "California," all as set forth in the aforesaid claim for refund previously referred to herein.

6. Under the provisions of Sections 113(a) and 113(b) of the Internal Revenue Code, Plaintiff's unadjusted basis and adjusted basis for determining gain or loss from the disposition of said thirty (30) shares of the capital stock of Lawrence Barker, Inc., as hereinbefore alleged in paragraph 3 hereof, was the cost of said shares to Plaintiff, to wit: the amount of \$6,580.50, or \$219.35 per share. Said basis for determining gain or loss from the disposition of said thirty (30) shares of the capital stock of Lawrence Barker, inc., was in excess of the amount realized by Plaintiff from the disposition of said [3] thirty (30) shares of capital stock of Lawrence Barker, Inc. Plaintiff realized a loss from said disposition of the thirty (30) shares of the capital stock of Lawrence Barker, Inc. Said loss of Plaintiff was the amount of \$1,580.50.

7. Plaintiff has filed his Federal Income Tax Returns for all years on the basis of the calendar year. Plaintiff filed his Federal Income Tax Return for the calendar year 1943 on March 15, 1944, with the Collector of Internal Revenue of the

United States for the Sixth District of California, at Los Angeles, California. Plaintiff included in said tax return as income from capital gain, the entire amount received by him from the aforesaid disposition of the thirty (30) shares of the capital stock of Lawrence Barker, Inc., to wit: the amount of \$5,000.00. Said tax return of the Plaintiff for the calendar year 1943 disclosed a liability for Federal Income and Victory Taxes in the sum of \$34,454.97. Plaintiff paid said sum of \$34,454.97 to the Collector of Internal Revenue of the United States for the Sixth District of California, at Los Angeles, California. Plaintiff paid said sum of \$34,454.97 in the manner, amounts, and at the times following, to wit: on March 15, 1943, \$794.41; on September 15, 1943, \$170.17; on December 15, 1943, \$6,951.59; on March 15, 1944, \$25,890.20; withheld by Plaintiff's employer during 1943, \$648.60. Said tax return of the Plaintiff for the calendar year 1943 was erroneous. The inclusion by Plaintiff in said tax return, as income from capital gain, of the amount realized from the disposition of the thirty (30) shares of the capital stock of Lawrence Barker, Inc., received by Plaintiff, to wit: the sum of \$5,000.00, or the inclusion of any other sum as income from the disposition by Plaintiff of said thirty (30) shares of capital stock of Lawrence Barker, Inc., was erroneous. Plaintiff realized a loss of \$1,580.50 upon the disposition of said thirty (30) shares of the capital stock of Lawrence Barker, Inc. Said loss of \$1,580.50 is not included in the said tax return of Plaintiff for the calendar year

1943. Said loss of \$1,580.50 should properly be included in determining Plaintiff's liability for Federal Income and Victory Taxes for the calendar year 1943. In determining Plaintiff's liability for Federal Income and Victory Taxes for the calendar year 1943, the inclusion of the said loss [4] of \$1,580.50, and the exclusion of the said gain of \$5,000.00 erroneously reported by Plaintiff on his tax return for the calendar year 1943, as income from capital gain upon the disposition of the thirty (30) shares of the capital stock of Lawrence Barker, Inc., result in a liability of Plaintiff for Federal Income and Victory Taxes for the calendar year 1943, in the sum of \$32,635.99. Said sum of \$32,635.99 is the correct amount of Plaintiff's liability for Federal Income and Victory Taxes for the calendar year 1943. Plaintiff has overpaid his taxes for said year in the amount of \$1,818.98.

8. As referred to in paragraph 5 hereof, pursuant to the provisions of Section 322 of the Internal Revenue Code, Plaintiff duly executed and filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at Los Angeles, California, on March 15, 1947, a claim for refund of Federal Income and Victory Taxes for the calendar year 1943. The amount of Income and Victory Taxes so claimed for refund was \$1,818.98. Under date of July 27, 1948, Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue, pursuant to Section 3772(a)(2) of the Internal Revenue Code, that said claim for refund had been disallowed in

full. A copy of said letter of notice of disallowance is attached hereto, marked Exhibit "II" and incorporated herein by reference as if fully set forth herein. No further action has been taken with respect to said claim since, and no part of Plaintiff's overpayment of 1943 taxes in the amount of \$1,818.98 has been refunded or credited to Plaintiff.

9. By reason of the premises, Plaintiff is entitled to a refund of Federal Income and Victory Taxes for the calendar year 1943, in the amount of \$1,818.98, together with interest thereon, as provided by law, or such greater amount as is legally refundable.

Wherefore, Plaintiff prays judgment against the defendant for the sum of \$1,818.98, together with interest thereon, as provided by law, or such greater amount as is legally refundable, and for his costs of suit, and for such other and further relief as this Honorable Court shall deem proper.

Dated: April 22, 1949.

/s/ ARTHUR MANELLA, of
BERGER & IRELL,

Attorneys for Plaintiff. [5]

State of California,
County of Los Angeles—ss.

Lawrence Barker, being by me first duly sworn, deposes and says: That he is the Plaintiff in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon informa-

tion and belief, and as to those matters he believes it to be true.

/s/ LAWRENCE BARKER.

Subscribed and sworn to before me this 22nd day of April, 1949.

[Seal] /s/ CLINTON F. SECCOMBE,
Notary Public in and for the County of Los Angeles, State of California. [6]

Exhibit "I"

Lawrence Barker
Claim

To be Filed with the Collector Where Assessment was Made or Tax Paid.

The Collector will indicate the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp
(Date Received.)

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Lawrence Barker.

Business address: 302 Quinby Building, Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1943, to December 31, 1943.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, \$34,454.97; dates of payment 3/15/43; 6/15/43; 9/15/43; 12/15/43; 3/15/44.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: \$1,818.98.
7. Amount to be abated (not applicable to income or estate taxes): [7]
8. The time within which this claim may be legally filed expires, under Section 322(b) of the IRC on March 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

(See Statement Attached.)

/s/ LAWRENCE BARKER.

Sworn to and subscribed before me this 20th day of September, 1946.

[Seal]

ARTHUR MANELLA,

(Signature of officer administering oath.)

Notary Public

(Title) [8]

Lawrence Barker

Refund Claim

1943 Income Tax

Statement

The taxpayer reported on his 1943 return a capital gain of \$5,000.00, the entire proceeds realized from liquidation of a portion of taxpayer's holding of capital stock of Lawrence Barker, Inc., to wit, 30 shares thereof. The basis for gain or loss from the disposition of said shares has been ascertained to be \$219.35 per share, and in accordance with the provisions of I.R.C., Sections 115(c) and 111, no gain, but a loss was realized from this transaction. Although payment for the said 30 shares of Lawrence Barker, Inc., stock was made to the taxpayer by way of crediting the amount of \$5,000.00 against taxpayer's indebtedness to Lawrence Barker, Inc., the said payment, a liquidation distribution, was not the equivalent of a taxable dividend, and in fact the corporation had no "earnings and profits" out of which a dividend could have been distributed at the time of said payment.

In 1923 Barker Bros., Inc., a California corporation, hereinafter called "California," was engaged in the business of selling furniture and house furnishings in Los Angeles, California. Its outstanding capital stock consisted of preferred stock of a total par value of \$575,000.00, and 17,894.35 shares of common stock, having a total par value of \$1,789,435.00. Of the 17,894.35 shares of California common stock, 8,179.69 shares were owned by Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased, Lawrence Barker, individually (claimant herein), Lawrence Barker, Trustee, Mrs. W. A. (Pauline) Barker, and F. K. Colby, Trustee, which group of persons is hereinafter referred to as the Lawrence Barker Interests. The total basis for gain or loss of these 8,179.69 shares to the Lawrence Barker Interests was \$1,326,081.86, or an average basis of \$162.1188 per share. The remaining common shares of California were owned by a group of persons hereinafter referred to as the C. H. Barker Interests, and by certain employees of "California." [9]

In the latter part of 1923, the Lawrence Barker Interests decided to withdraw from participation in the business. On December 20, 1923, the Lawrence Barker Interests entered into an agreement with the C. H. Barker Interests, under the terms of which agreement the parties agreed to effect a reorganization of "California," as follows: A new corporation, Barker Bros., Inc., a Delaware corporation, hereinafter called "Delaware," was to be

formed. "Delaware" would acquire all of the common stock of "California" and would eventually dissolve "California," and so obtain all of the assets and business. The C. H. Barker Interests would ultimately receive 100,000 shares of no par common stock of "Delaware." At the same time another corporation was to be formed, called Lawrence Barker, Inc., all of whose authorized stock was to be received by the Lawrence Barker Interests. L. B. Inc. was ultimately to receive \$1,000,040.00 cash (from the sale at 92 of \$1,087,000.00 First Preferred Stock of "Delaware"), \$1,000,000.00 First Preferred Stock of "Delaware," and \$2,300,000.00 of Second Preferred Stock of "Delaware," issued by "Delaware" to it.

Also on December 20, 1923, the Lawrence Barker Interests and the C. H. Barker Interests entered into an agreement with Marshall Field, Glore, Ward & Co., investment bankers, hereinafter referred to as "Bankers." By the terms of this agreement, the previously mentioned agreement between the Lawrence Barker Interests and the C. H. Barker Interests was affirmed, and "Bankers" agreed to supply the necessary cash for the transaction through the purchase of \$1,087,000.00 First Preferred Stock of "Delaware." As one of the considerations, "Bankers" demanded, and received, an option to purchase for cash at 92 the additional \$1,000,000 par value First Preferred Stock of "Delaware" to be issued to L. B. Inc.

Both of the above-mentioned agreements were carried out. "Delaware" and L. B. Inc. were formed. On December 28, 1923, the "California"

common shareholders surrendered all their shares to "Delaware." "Delaware," in turn, issued its temporary \$100.00 par value common stock, 43,870 shares directly to L. B. Inc., and 51,825 shares to the other "California" common shareholders (not including the Lawrence Barker Interests). The same day, L. B. Inc. issued all of its shares to the Lawrence Barker Interests.

The next day, December 29, 1923, L. B. Inc. returned to "Delaware" the [10] 43,870 shares of temporary \$100.00 par value common stock of "Delaware" in exchange for 20,870 shares of First Preferred Stock, and 23,000 shares of Second Preferred Stock of "Delaware." Immediately after this exchange, L. B. Inc. sold 10,870 shares of the First Preferred Stock of "Delaware" to Lawrence Barker personally for \$1,000,040.00. Lawrence Barker, in turn, sold that stock for the same amount to "Bankers." The only cash involved in this transaction came from "Bankers" and was paid over to L. B. Inc.

Also on December 29, 1923, certain employee interests of "California" turned into "Delaware" 935 shares of the temporary \$100.00 par value common stock of "Delaware" (which they had received in exchange for their "California" common shares) in exchange for 935 shares of Second Preferred Stock of "Delaware."

After this point, L. B. Inc. and the Lawrence Barker Interests took no further part in the reorganization of "California." "California" and "Delaware" took further steps to carry out the rest of the plan, with the result that on March 1, 1924,

all of the assets and business of "California" were transferred to "Delaware," and the temporary \$100.00 par value common stock of "Delaware," previously owned by the C. H. Barker Interests, had been retired and replaced by a no par issue. The total amount of this no par issue, 100,000 shares, was held by the former common shareholders of "California," exclusive of the Lawrence Barker Interest and the employee interests. "Delaware" also redeemed and retired all of "California's" outstanding preferred stock.

The fair market value of the Delaware preferred shares, both First and Second, at the date of issue was \$100.00 per share. In setting up its capital structure, L. B. Inc. treated the 42,870 shares of First and Second Preferred "Delaware" stock received as having a value of \$4,287,000.00. L. B. Inc.'s capital, consisting of 20,000 shares of stock with \$100.00 par value, was stated to be \$2,000,000.00. The balance of the consideration received by L. B. Inc. for the issue of its capital stock was designated as donated capital surplus. From January 1, 1924, to May 31, 1928, L. B. Inc. sold all of the "Delaware" Preferred shares, except 16,240 shares of Second Preferred. All of the First Preferred Stock of "Delaware" was sold to "Banker" by L. B. Inc. pursuant to the option agreement previously mentioned. For the purposes of calculating its [11] earnings and profits, L. B. Inc. designated as profits only the amounts, if any, received in excess of \$100.00 per share.

On May 20, 1928, the 16,240 shares of "Delaware" Second Preferred were transferred to Bar-

ker Holding Co., a Canadian corporation, in exchange for all of its capital stock. The Barker Holding Co. sold the shares so received, also calculating its profits only on the excess received over the \$100.00 basis. This transaction was subsequently decided to result in a gain for tax purposes to L. B. Inc., based upon the cost of the original shares of "California" (a substituted basis). However, this gain has never been reflected upon the books of the corporation.

The rule that the basis for determining gain or loss from the sale or other disposition of property is the cost of such property, applies in determining the basis of the L. B. Inc. stock in the hands of the Lawrence Barker Interests. Section 204(a) of the Revenue Act of 1924 (IRC, Sec. 113(a)). The cost of the L. B. Inc. stock to the Lawrence Barker Interests is the fair market value at the date of the exchange of the property ("California" stock) exchanged therefor. This fair market value was \$4,387,000.00, or \$219.35 per share for each of the 20,000 shares of L. B. Inc. stock received by the Lawrence Barker Interests. The transaction by which the Lawrence Barker Interests acquired the L. B. Inc. stock did not constitute a tax-free exchange within the provisions of Section 202(c) of the Revenue Act of 1921. The basis of the L. B. Inc. stock in the hands of the Lawrence Barker Interests is not governed by Section 113(a) (6) of the Internal Revenue Code. [12]

Exhibit "II"

Treasury Department
Washington 25

Office of Commissioner of Internal Revenue
July 27, 1948.

Address Reply to
Commissioner of Internal Revenue
and Refer to IT:Cl:CC:Rej

Mr. Lawrence Barker
302 Quinby Building
Los Angeles, Calif.

In re: Claim for refund of \$685.36, \$1,818.98,
\$1,818.98 for the year 1942, 1943, 1943.

Dear Mr. Barker:

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,
E. I. McLARNEY,
Deputy Commissioner.

[Endorsed]: Filed April 27, 1949. [13]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and in answer to the plaintiff's Complaint for refund of Federal income and victory taxes herein, admits, denies and alleges as follows:

I.

The allegations of paragraph 1 in the Complaint are admitted.

II.

The allegations of paragraph 2 in the Complaint are admitted.

III.

The defendant denies the allegations of paragraph 3 of the Complaint for the reason that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof.

IV.

The allegations of paragraph 4 of the Complaint are denied. [14]

V.

Defendant denies the allegations set forth in paragraph 5 of the Complaint for the reason that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof except that defendant does admit that the plaintiff executed and duly filed with the Collector of Internal Revenue at Los Angeles, California,

a claim for refund on March 15, 1947, and that a true copy of said claim for refund is attached to the Complaint and marked Exhibit "I."

VI.

The allegations of paragraph 6 of the Complaint are denied.

VII.

The allegations to paragraph 7 of the Complaint are denied except that defendant does admit that plaintiff filed income tax returns for all years on the calendar year basis and that the plaintiff's income tax return for the calendar year 1943 was filed on March 15, 1944, with the Collector of Internal Revenue at Los Angeles, California; that said tax return included as income from capital gain the entire amount received by plaintiff from the disposition of thirty shares of the capital stock of Lawrence Barker, Inc.; that said return disclosed a tax liability as alleged in said paragraph 7 and said liability was paid by plaintiff at the times and in the amounts set forth in said paragraph 7.

VIII.

The allegations of paragraph 8 of the Complaint are admitted.

IX.

The allegations of paragraph 9 of the Complaint are denied.

Wherefore, Defendant prays that plaintiff take

nothing by this [15] action, and that defendant have judgment against plaintiff for its costs.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES D. PETTUS,
Special Attorney, Bureau of
Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Defendant,
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 26, 1949. [16]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 14th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Ben Harrison,
District Judge.

[Title of Cause.]

For trial; Arthur Manella, Esq., appearing as counsel for plaintiffs; Eugene Harpole, Att'y, Bureau of Internal Revenue, appearing as counsel for Gov't; Attorney Harpole makes a statement of objections to certain portions of the stipulation of facts filed.

Court orders these causes consolidated on stipulation, and that they be submitted on stipulation of facts filed, and that briefs be filed 30x30x30.

In the District Court of the United States, Southern
District of California, Central Division
Civil Action No. 9621-BH

LAWRENCE BARKER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 9620-BH

MRS. W. A. BARKER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective

counsel, that the following facts shall be taken to be true, and may be offered in evidence in these proceedings, together with any exhibits attached hereto, subject to the right of either party to object to any of such facts or exhibits on the grounds of relevancy or materiality, and subject further to the right of either party to introduce such other and additional evidence as is not inconsistent with or contrary to the facts herein stipulated. [19]

I.

Lawrence Barker, one of the plaintiffs herein, and Charles Lawrence Barker, C. Lawrence Barker and C. L. Barker are one and the same person.

Plaintiff Pauline Barker and Mrs. W. A. Barker are one and the same person. Pauline Barker is the mother of Lawrence Barker and the widow of W. A. Barker, who died in 1922.

II.

On October 19, 1923, and up to and including December 28, 1923, Barker Bros. Inc. was a California corporation, hereinafter referred to as Barker California, engaged in the business of selling furniture and house furnishings. Its outstanding capital stock consisted of 5,750 shares of voting preferred stock, having a total par value of \$575,000, and 17,894.35 shares of common stock, having a total par value of \$1,789,435.

III.

On October 19, 1923, and up to and including

December 28, 1923, the common stock of Barker California was owned as follows:

Stockholder	Number of Shares
Charles Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased...	3,418.19
Pauline Barker.....	1,660
Lawrence Barker, individually.....	1,841.50
F. K. Colby, Trustee.....	300
Lawrence Barker, Trustee.....	960
C. H. Barker, C. A. Barker, Erle P. Barker	8,187.69
J. W. Beam, Trustee for certain employees of Barker California.....	1,526.97
<hr/>	
Total	17,894.35

The above named C. H. Barker was the brother of W. A. Barker, deceased. C. H. Barker was also the father of C. A. Barker, also known as Clarence A. Barker, and Erle P. Barker, who are mentioned above.

The above named Charles Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased, Pauline Barker, Lawrence Barker, individually, F. K. Colby, Trustee, and Lawrence Barker, Trustee, owners of common stock of Barker California aggregating 8,179.69 shares, as more particularly set forth, are sometimes hereinafter referred to as the Lawrence Barker interests.

25,000 shares of first preferred stock having a par value of \$100 per share;

25,000 shares of second preferred stock having a par value of \$100 per share; and [22]

100,000 shares of common stock having a par value of \$100 per share.

The first meeting of the Board of Directors of Barker Delaware was held in New York City, N. Y. on December 28, 1923. A copy of said minutes is attached hereto and marked Exhibit "6." At said meeting the directors of Barker Delaware met and considered the offer made by C. H. Barker, C. A. Barker, and Erle P. Barker for the exchange of common stock of Barker California for common stock of Barker Delaware, the terms of which offer are set forth in said Exhibit "6." Said offer was accepted by Barker Delaware on December 28, 1923.

In accordance with the terms of said offer made by the aforesaid persons \$5,089,200 par value common stock of Barker Delaware, or 50,892 shares of said common stock, were issued in the names of said persons. Of the 9,488.66 shares of Barker California covered by the offer made by C. H. Barker, C. A. Barker, and Erle P. Barker, 1300.97 shares were owned by the employees of Barker California, as set forth in paragraph III above. Of said 50,892 shares of Barker Delaware so issued, 6,945.91 shares were held on behalf of said employees.

IX.

On December 28, 1923, Charles Lawrence Barker, Executor of the Estate of W. A. Barker, Deceased,

C. Lawrence Barker and C. L. Barker, Trustee, F. K. Colby, Trustee, and Pauline Barker, made an offer for the exchange of common stock of Barker California for common stock of Barker Delaware, the terms of which offer are set forth in Exhibit "6." Said offer was accepted by Barker Delaware on December 28, 1923.

In accordance with the terms of said offer made by the Lawrence Barker interests, \$4,387,000 of par value common stock of Barker Delaware, or 43,870 shares of said common stock, were [23] issued in the name of L. B., Inc., in accordance with the terms of the letter of December 28, 1923, set forth in Exhibit "6."

X.

On December 28, 1923, J. W. Beam and Martha B. Beam made an offer to Barker Delaware for the exchange of common stock of Barker California for common stock of Barker Delaware, the terms of which offer are set forth in Exhibit "6." Said offer was accepted by Barker Delaware on said date.

In accordance with the terms of said offer made by said persons, \$93,500 par value common stock of Barker Delaware, or 935 shares of said common stock, were issued in the names of said persons.

XI.

On December 28, 1923, a meeting of the Board of Directors of L. B., Inc. was held in Los Angeles, California. A copy of the minutes of said meeting is attached hereto, marked Exhibit "7." At said meeting a written offer was submitted by the Law-

rence Barker interests to L. B., Inc., the terms of which are set forth in Exhibit "7." Said offer was accepted by L. B., Inc. on said date, subject to the issuance of a permit by the Commissioner of Corporations of the State of California.

XII.

On the same day, December 28, 1923, another meeting of the Board of Directors of L. B., Inc. was held, a copy of the minutes of which meeting is attached hereto and marked Exhibit "8." A copy of the application made to the Commissioner of Corporations of the State of California, and his permit referred to in said minutes, are attached hereto and marked Exhibit "9." At said meeting temporary certificates of stock of L. B., Inc. were issued pursuant to the terms of the offer referred to above, as follows: [24]

C. Lawrence Barker.....	4,504.13
Pauline Barker.....	4,062.24
C. L. Barker, Trustee.....	2,350.23
Lawrence Barker, Executor of the Estate of W. A. Barker, deceased.....	8,353.67
F. K. Colby, Trustee.....	726.73
	<hr/>
	19,997.00

Thereafter the Board of Directors of L. B., Inc. resolved to make an offer to Barker Delaware for the exchange of common stock of said Barker Delaware for preferred stock of said Barker Delaware,

the terms of which offer are set forth in Exhibit "8."

XIII.

On December 29, 1923, Barker Delaware held a meeting of its Board of Directors, a copy of the minutes of which are attached hereto and marked Exhibit "10." At said meeting the offer made by L. B., Inc. was received and accepted, and pursuant to said offer and acceptance 43,870 shares of common stock of Barker Delaware were exchanged by L. B., Inc. for 20,870 shares of first preferred stock of Barker Delaware and 23,000 shares of second preferred of Barker Delaware. There was also received by said Barker Delaware at said meeting an offer in writing signed by J. W. Beam and Martha B. Beam, by the terms of which the said persons offered to exchange 935 shares of the common stock of said corporation owned by them for 935 shares of the second preferred capital stock of said corporation. Said offer was accepted, and said shares were issued in accordance therewith.

XIV

On December 29, 1923, a meeting of the Board of Directors of L. B., Inc. was held, a copy of the minutes of which is attached hereto and marked Exhibit "11." At said meeting an offer was made by Lawrence Barker, the terms of which are set forth in said [25] Exhibit "11," and said offer was accepted by L. B., Inc.

XV.

On January 3, 1924, there was a special meeting

of the Board of Directors of Barker Delaware held at New York City, New York, a copy of the minutes of which is attached hereto and marked Exhibit "12." In February, 1924, pursuant to the resolution adopted at said meeting, Barker Delaware sold to Bankers all of its remaining unissued first preferred stock of a par value of \$413,000.

XVI.

In February, 1924, Bankers notified L. B., Inc. and Lawrence Barker, individually, that it would purchase certain shares of first preferred stock of Barker Delaware pursuant to the terms of the agreement dated December 20, 1923, a copy of which is attached hereto and marked Exhibit "4." Thereafter, on February 11, 1924, there was delivered to Bankers 10,870 shares of first preferred stock of Barker Delaware in consideration of the payment by the Bankers of \$1,000,040, plus dividends accrued from January 1, 1924.

XVII.

On February 10, 1924, a meeting was held by the Board of Directors of L. B., Inc., a copy of the minutes of which is attached hereto and marked Exhibit "13." Pursuant to the resolution adopted at said meeting, and pursuant to the exercise by Bankers of their option, L. B., Inc. sold to Bankers 2,500 shares of first preferred capital stock of Barker Delaware for \$230,000, plus dividends accrued from January 1, 1924.

In addition to the above-mentioned sum of \$230,000, the books of L. B., Inc. show the receipt of

\$20,000 from Barker Delaware in respect of the sale of said shares. [26]

XVIII.

On February 27, 1924, there was a meeting of the Board of Directors of L. B., Inc., a copy of the minutes of which is attached hereto and marked Exhibit "14." Pursuant to the resolution adopted at said meeting, and pursuant to the exercise by Bankers of their option, L. B., Inc. sold to Bankers 2,500 shares of first preferred capital stock of Barker Delaware for \$230,000, plus accrued dividends to February 28.

In addition to the above-mentioned sum of \$230,000, the books of L. B., Inc. show the receipt of \$20,000 from Barker Delaware in respect of the sale of said shares.

On April 15, 1924, pursuant to the exercise by Bankers of their option, L. B., Inc. sold to Bankers 4,000 shares of first preferred capital stock of Barker Delaware for \$368,000, plus accrued dividends of \$1,003.33.

In addition to the aforementioned sum of \$368,000, the books of L. B., Inc. show the receipt of \$32,000 from Barker Delaware in respect of the sale of said shares.

On May 16, 1924, pursuant to the exercise by Bankers of their option, L. B., Inc. sold to Bankers 1,000 shares of first preferred capital stock of Barker Delaware for \$92,000, plus accrued dividends of \$937.50. In addition to the aforementioned sum

of \$92,000, the books of L. B., Inc. show the receipt of \$8,000 from Barker Delaware in respect of the sale of said shares.

XIX.

Prior to December 28, 1923, the cost or other basis for determining gain or loss on the sale or disposition of the shares of stock of Barker California in the hands of the persons who became the stockholders of L. B., Inc., was as follows:

Stockholder	No. of Shares	Basis
Estate of W. A. Barker.....	3,368.19	\$753,598.84
Estate of W. A. Barker.....	50	9,239.85
Pauline Barker	1,660	163,577.19
Lawrence Barker	1,841.50	235,031.57
Lawrence Barker, Trustee.....	960	126,345.26
F. K. Colby, Trustee.....	300	38,289.15
	<hr/> 8,179.69	<hr/> \$1,326,081.86

The fair market value of said shares immediately prior to December 28, 1923, was \$4,387,000, equal to a fair market value of \$536.326393 per share.

Said amount of \$1,326,081.86, if apportioned among 43,870 shares of common stock, or 43,870 shares of first and second preferred stock of Barker Delaware, equals \$30.227533 per share.

XX.

The opening Journal Entries of L. B., Inc. are as follows:

	Debit	Credit
Investment Account #1	\$4,387,000	
Capital Stock—common		\$2,000,000
Surplus, donated		2,387,000

Receipt of 43,870 shares of Barker Bros., Incorporated Common Capital Stock for the payment of subscription of the entire Capital Stock of this corporation as per agreement.

Investment Account #2	2,087,000	
Investment Account #3	2,300,000	
Investment Account #1		4,387,000

Exchange of Common Capital Stock—43,870 shares—Barker Bros., Incorporated for 20,870 shares First Preferred and 23,000 shares Second Preferred Capital Stock.

XXI.

On January 3, 1924, pursuant to resolutions of the Board of Directors and Stockholders of Barker Delaware, the Articles of Incorporation of said Barker Delaware were amended to change the authorized common capital stock of said corporation from 100,000 shares of \$100 par common stock to 100,000 shares of no par common stock. A copy of the minutes of said meeting of the Board of Directors is hereto attached as Exhibit "12."

On January 5, 1924, said 100,000 shares of no par common stock were issued pro rata to the holders of \$5,089,200 par value of the \$100 par value common stock in exchange therefor.

Thereafter, said 100,000 shares of no par value common stock was the only authorized, issued, and outstanding common stock of said Barker Delaware.

XXII.

On March 1, 1924, Barker California conveyed all of its assets to Barker Delaware, subject to all

of the outstanding liabilities of Barker California, including the liability for the outstanding preferred stock of Barker California. Barker Delaware assumed the liabilities of Barker California, including the liability for the said preferred stock. The foregoing transfer of assets and assumption of liabilities was accomplished pursuant to resolutions adopted by the Boards of Directors of the two corporations.

Thereafter, Barker Delaware redeemed and retired the entire outstanding issue of preferred stock of Barker California.

On said March 1, 1924, there were issued and outstanding shares of the capital stock of said Barker Delaware as follows:

25,000 shares First Preferred Stock
 23,935 shares Second Preferred Stock
 100,000 shares no par Common Stock. [29]

XXIII.

The Board of Directors of L. B., Inc. in the following years adopted resolutions, the terms of which declared dividends, payable pro rata, to stockholders of record in the following amounts, to-wit:

Year	Dividend
1925	\$ 60,000.00
1926	140,000.00
1927	140,000.00
1928	140,000.00
1929	180,000.00

Year	Dividend
1930	100,000.00
1931	140,000.00
1934	120,000.00
1936	20,000.00
1937	57,000.00
1938	45,000.00
1939	65,000.00
1940	61,000.00
1941	56,000.00
1942	30,000.00
1943	110,264.64

and said amounts were by said corporation paid or credited thereafter.

XXIV.

The schedule attached hereto and marked Exhibit "15," which said schedule is hereby referred to and incorporated herein, accurately sets forth as of the dates to which said schedule refers, the balances in the account designated earned surplus as recorded on the books of L. B., Inc. [30]

XXV.

During the taxable year 1923, L. B., Inc. disposed of 10,870 shares of Barker Delaware first preferred stock for \$1,000,040; that the said stock so disposed of by L. B., Inc. was carried on the books of L.B., Inc. at a cost of \$1,087,000; and that the difference of \$86,960 was charged to the account designated as Surplus Donated or Capital Surplus or Paid In Surplus in the books of account of L. B., Inc. Said

charge of said difference has not been reflected in Exhibit "15."

XXVI.

Of the 20,870 shares of Barker Delaware first preferred stock and 23,000 shares of Barker Delaware second preferred stock, referred to in paragraph XXII hereof, the following shares were sold or disposed of by L. B., Inc. during the following years and for the following amounts: [31]

Date	1st Pfd.	2nd Pfd.	Amt. Received
12/29/1923.....	10,870 shares		\$1,000,040.00
2/11/1924.....	2,500 shares		250,000.00
2/26/1924.....		1,500 shares	150,000.00
2/28/1924.....	2,500 shares		250,000.00
4/15/1924.....	4,000 shares		400,000.00
5/16/1924.....	1,000 shares		100,000.00
7/16/1924.....		200 shares	20,000.00
1/31/1925.....		500 shares	50,000.00
2/16/1925.....		760 shares	76,000.00
8/12/1925.....		405 shares	40,500.00
2/15/1926.....		920 shares	92,000.00
9/14/1926.....		335 shares	33,500.00
2/21/1927.....		1,000 shares	100,000.00
3/ 1/1927.....		35 shares	3,500.00
9/20/1927.....		421 shares	42,100.00
2/24/1928.....		684 shares	68,400.00
5/30/1928.....		16,240 shares	1,418,945.42
Totals.....	<u>20,870 shares</u>	<u>23,000 shares</u>	<u>\$4,094,985.42</u>

Said first and second preferred stock of Barker Delaware was carried upon the books of L. B., Inc. at a cost of \$100 per share.

In addition to the foregoing first preferred shares, acquired as set forth in paragraph XIII hereof, L. B., Inc., on May 16, 1924, purchased 1,000 shares

of said first preferred stock at \$92 per share, or a total cost of \$92,000. Said stock so acquired was disposed of as follows:

Date	No. of Shares	Amt. Received
9/15/1924.....	250	\$23,000
10/ 9/1924.....	250	23,000
12/ 6/1924.....	250	23,000
1/ 5/1925.....	250	23,000
Totals.....	<u>1,000</u>	<u>\$92,000</u>

In addition to the aforementioned second preferred stock of Barker Delaware, acquired as set forth in paragraph XIII hereof, L. B., Inc. purchased 615 shares of said second preferred stock as follows: [32]

Date	No. of Shares	Price Paid
7/28/1924.....	150	\$15,000
1/ 9/1925.....	25	2,500
2/ 6/1925.....	50	5,000
3/12/1925.....	100	10,000
4/17/1925.....	25	2,500
1/ 6/1926.....	50	5,000
1/27/1926.....	40	4,000
10/ 7/1926.....	15	1,500
3/ 1/1927.....	41	4,100
8/31/1927.....	50	5,000
9/29/1927.....	19	1,900
3/ 1/1928.....	50	5,000
Totals.....	<u>615</u>	<u>\$61,500</u>

All of said shares of second preferred stock so purchased were sold on February 24, 1928, for \$61,500.

XXVII.

From the date of the formation of L. B., Inc. to December 31, 1943, stock of said corporation has

been issued, transferred and reissued, all as set forth in a schedule attached hereto and marked Exhibit "16."

The stock in the amount of 2,350.23 shares originally standing in the name of Lawrence Barker, Trustee, as set forth in said exhibit, was held by him by and under the terms of certain gifts. Common stock of Barker California was given by W. A. Barker, during his lifetime, and Pauline Barker, to their grandchildren, then minors, who were children of Lawrence Barker. These children are Elizabeth Barker Forbes Derby, Lawrence Barker, Jr., and William A. Barker II. The interest given to each grandchild under the terms of said gift amounted to 320 shares of the common stock of Barker California, or a total of 960 shares which were exchanged in the transactions described in paragraphs IX, XI, and XII hereof. On November 27, 1934, Elizabeth Barker Forbes Derby, who had then reached her majority, transferred her interest to her father, Lawrence Barker, as Trustee, for the use and benefit of said Elizabeth Barker Forbes Derby until she reached the age of 30 years.

The 928 shares of L. B., Inc., formerly standing in the name of Horace S. Wilson and Philip R. Johnson, Trustees, were portions [33] of the corpus of three trusts created by Lawrence Barker, as Trustor, on October 31 and November 8, 1923. The aforesaid children of Lawrence Barker, to wit: Elizabeth Barker Forbes Derby, Lawrence Barker, Jr., and William A. Barker II, were the beneficiaries under said trusts. The balance of the corpus

of each trust consisted of policies of insurance upon the life of said Lawrence Barker. Each trust provided that it should terminate when its beneficiary reached the age of 30 years.

On March 30, 1943, the trusts under which 2350.23 shares of L. B., Inc. stock stood in the name of Lawrence Barker, Trustee, and 928 shares of L. B., Inc. stock stood in the name of Horace S. Wilson and Philip R. Johnson, Trustees, were terminated, and the shares distributed to the beneficiaries thereof as follows:

1092.75 shares to Elizabeth Barker Forbes Derby;
1092.74 shares to Lawrence Barker, Jr.; and
1092.74 shares to Wililam A. Barker II.

Frank and Harry Berman, sometimes stockholders in Lawrence Barker, Inc., were brothers of Pauline Barker. Each originally acquired his share by gift from Pauline Barker. Pauline Barker repurchased the shares of Harry Berman on June 10, 1936, agreeing to pay therefor the sum of \$32,500.

Pauline Barker repurchased the shares of Frank Berman on April 21, 1937, pursuant to agreement, whereby Pauline Barker forgave a debt owing to her from said Frank Berman in the amount of \$43,187, and further promised to pay to said Frank Berman, or his wife should she survive him, an annuity of \$3,600.

XXVIII.

On or about December 30, 1943, Lawrence Barker and Mrs. W. A. Barker each transferred to L. B.,

Inc. thirty (30) shares of the capital stock of L. B., Inc., and Lawrence Barker and Mrs. W. A. Barker each were credited with the amount of \$5,000 against their indebtedness to L. B., Inc. The shares of stock so received [34] by L. B., Inc. were retired by it and the certificates evidencing such shares were cancelled. The 30 shares of capital stock of L. B., Inc. which Lawrence Barker and Mrs. W. A. Barker each transferred to L. B., Inc., as set forth herein, were acquired by them as part of the 19,997 shares of stock issued by L. B., Inc. to the Lawrence Barker interests on December 28, 1923, in exchange for the transfer by the Lawrence Barker interests to L. B., Inc. of 8179.69 shares of common stock of Barker California, all as set forth in Paragraph XII and Paragraph XIX hereof.

Dated: October 26, 1949.

IRELL & MANELLA,

By /s/ ARTHUR MANELLA,

Attorneys for Plaintiffs.

ERNEST A. TOLIN,

United States Attorney.

E. H. MITCHELL, and

EDWARD R. McHALE,

Assistant United States Attorneys,

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,

Attorneys for Defendant. [35]

Exhibit 1

The undersigned stockholders of Barker Bros., Inc., a corporation, in consideration of the sum of \$10. to each in hand paid by Hunter, Dulin & Co., a corporation, on the execution of this agreement, hereby give to said Hunter, Dulin & Co., the right to purchase all of the stock of said Barker Bros. Inc., which the undersigned now own, as set opposite their respective names hereinbelow, or in which they have any interest, and also all their right, title and interest in and to any additional stock of said Barker Bros. Inc. now issued or hereafter to be issued, upon the following terms and conditions:

Hunter, Dulin & Co. shall have the right to make a full investigation of all of the books and accounts of said Barker Bros. Inc., and the undersigned agree to have said Barker Bros. Inc. furnish all facilities necessary for such investigation and to have such accounting made and reports delivered as Hunter, Dulin & Co. may designate.

This agreement shall remain in effect for a period of ninety days from date hereof unless, in order to consummate the sale then pending, it shall be necessary in the judgment of said Hunter, Dulin & Co. to have a further examination and analysis made of the affairs of said Barker Bros. Inc., and in such event this agreement shall be extended for a reasonable time beyond ninety days.

During the life of this agreement the undersigned agree to cause the business of said Barker Bros. Inc. to be carried on continuously in a highly efficient and proper manner.

The undersigned agree that Hunter, Dulin & Co. shall have the right to assign this agreement with all its rights and obligations to any person, firm or corporation selected by said Hunter, Dulin & Co.

In the event that said Hunter, Dulin & Co. or their [36] assignee decide to purchase said stock in accordance with this agreement, the undersigned agree to sell all of said stock now owned by them or to which they have any right, title or interest, and all their right to any further stock of said Barker Bros. Inc., now issued or hereafter to be issued, and also all their right, title and interest to any other property and assets of said Barker Bros. Inc., upon payment to the undersigned for the same on the basis of \$10,500,000. for the entire net worth, including good will, of said Barker Bros. Inc., each of the undersigned to receive from the amount paid such proportion thereof as the number of shares set opposite his name bears to the total number of shares of all subscribers hereto.

In the event of such purchase, the undersigned agree to deliver their stock to such person or persons and at such place as said Hunter, Dulin & Co. may designate upon payment therefor of the amount agreed herein in cash or in cash and securities acceptable to the undersigned in proportion to the interest of each, and the undersigned further agree that in such event they will pay to Hunter, Dulin & Co. at the time of said sale a commission of 5% of the total consideration involved in such sale which shall be deducted proportionately from the amounts payable hereunder to the undersigned, and shall also

be payable in cash or in cash and securities mutually acceptable in the same proportion payable to the undersigned.

In Witness Whereof, the undersigned have subscribed this agreement at Los Angeles, California, as of the 19th day of October, 1923, and have set opposite their respective names the number of shares of stock of said Barker Bros. Inc. owned or subscribed for by them. This agreement may be executed in triplicate.

PAULINE BARKER,
C. LAWRENCE BARKER,
C. LAWRENCE BARKER,
Trustee,
W. A. BARKER,

By C. LAWRENCE BARKER,
Executor. [37]

Exhibit 2

January 16, 1924

Messrs. Hunter, Dulin & Co.
California Bank Building
Los Angeles, California
Att'n Mr. E. S. Dulin

Gentlemen :

In consideration of your returning to me the option that you hold upon the Pauline Barker; C. Lawrence Barker; C. Lawrence Barker, Trustee; and W. A. Barker Estate holdings in Barker Bros., Inc. Common Stock, together with the valuable

services rendered in making it possible to consummate the present reorganization, I agree to the following:

1. From the first proceeds received by me from the sale of the securities of the new company, I agree to pay you forthwith a cash consideration of \$50,000.00.

2. On the investment of funds received from the sale of the securities that we will receive in the reorganization and also through moneys that I may have for investment, it is our intention to consult with your firm and give you first consideration in selecting the purchase of my investments as long as the present personnel is in your company.

3. On any publicity announcing the reorganization, etc., I will endeavor to have your name representing me as my broker in the transaction appear.

4. If for any unforeseen reason the present negotiations with the C. H. Barker branch of the family and Marshall Field, Glore, Ward & Company do not materialize, I agree to renew my option with you and also to give you full cooperation in obtaining in writing the verbal understanding between the other members of the family and the employes to effect the sale as originally contemplated by [38] you.

Yours very truly,

CLB:DW Accepted

Hunter, Dulin & Co.

By E. S. Dulin [39]

Exhibit "3"

Agreement

This Agreement made this 20th day of December, 1923, by and between C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, and F. K. Colby, Trustee, of the City of Los Angeles, State of California, the parties of the first part, and C. H. Barker, Clarence A. Barker and Erle P. Barker of Los Angeles, California, the parties of the second part.

Witnesseth:

That Whereas the parties to this agreement desire to reorganize the corporate affairs of Barker Bros. Inc. a corporation of which they are stockholders, and in such reorganization to readjust the several stock interests of the respective parties hereto in the manner hereinafter set forth,

Now, Therefore, the parties agree as follows:

1. The plan and method for carrying out and providing for the reorganization is set forth in Exhibit "A" attached hereto and by reference made a part hereof, and the parties to this agreement do hereby agree to do each and every thing and to execute any and all documents necessary, expedient or proper to carry out said plan and make same effective in all respects.

It is agreed that the final result to be accomplished is to have the respective interests of the parties in the reorganized corporation arranged as follows:

(a) First parties, through the Securities Company owned by them and referred to in said plan, to have a total of:

(1) \$1,000,000.00 in cash.

(2) \$1,000,000.00 First preferred Stock of the reorganized corporation, with provisions as set forth in Exhibit "3" attached to said [40] plan.

The first parties shall have the right to sell any or all of this preferred stock as they may desire, and it is agreed that in the event the first parties sell any portion of said stock within one year from date hereof, the reorganized corporation will pay to the first parties the cost of making such sale not to exceed \$8.00 on each \$100.00 par value of the stock so sold within one year from date hereof.

(3) \$2,300,000.00 in Second Preferred Stock of the reorganized corporation, with provisions as set forth in Exhibit "3" attached to said plan.

(b) The second parties, together with the employees of the present Barker Bros. corporation who own stock, shall be the owners of all of the common stock of the reorganized corporation.

It is understood that the plan set forth in Exhibit "A" attached hereto may be modified in any respect as to details as desired by the parties, provided, however, that the final results hereinbefore set forth are obtained. A. California corporation may be used as the reorganized corporation, if desired by

the parties of the first part and if the plan can be satisfactorily carried through with such a corporation.

(2) The said sale shall be deemed effective as of January 1, 1924. The parties of the first part shall be entitled to interest upon the sum of \$4,300,000. at the rate of 7% per annum from said first day of January, 1924, until the date upon which cumulative dividends on such preferred stocks shall begin to accrue to the benefit of [41] the first parties, and said interest shall be paid to the first parties within ten days from the date of delivery of said preferred stocks to them. The plan set forth herein shall be consummated as rapidly as reasonably possible and in any event within sixty days after demand, which demand may be made at any time after April 1, 1924, upon the parties of the second part by the parties of the first part, and if it is not then consummated within said sixty days after such demand (the failure to so consummate being due to no fault of or delay caused by any of the parties of the first part) then the parties of the first part shall thereupon be released from all obligations to carry out the plan herein provided.

3. The parties of the first part agree to assist the parties of the second part and the future management of Barker Bros. Incorporated in every way possible in carrying out this agreement and also to assist in the reorganization of the new Delaware corporation, and in helping to maintain and perfect the personnel of the new organization. They agree

to use their influence with the present employees of Barker Bros. Inc., to secure from them full support for and cooperation with the organization. It is understood, however, that the expenses of the reorganization of the new Barker Bros. corporation of Delaware will be borne by said corporation, and that the parties of the first part personally will not be required to pay any portion of such reorganization expenses.

4. In order fully to protect the parties of the first part as to their interests in the preferred stock of the reorganized corporation, it is agreed by the parties hereto that a man mutually satisfactory to all parties will be secured and made president of the new reorganized Barker Bros. corporation, and that a suitable compensation may be paid by the corporation to such a man in order to obtain a man of high standing in the business world. It is hereby agreed that Mr. H. S. McKee shall be the man [42] first employed to act as president of Barker Bros. Incorporated, and that said H. S. McKee shall not be removed as such president or relieved of any of the duties of said president without either (1) the consent of the parties of the first part; or (2) the concurring consent of the representative on the Board of Directors of Marshall Field, Gore, Ward & Co., and the parties of the second part. In the event of resignation or removal of said H. S. McKee a new man satisfactory either (1) to the parties of the first part and the parties of the second part; or (2) satisfactory to the representative of Marshall Field, Gore, Ward & Co. on the Board of

Directors, and the parties of the second part, shall be employed to take the place of the said H. S. McKee. The powers and duties of the president shall be as set forth in the proposed by-laws of the corporation heretofore agreed upon by the parties hereto, copy of which is attached hereto marked Exhibit "2."

In order further to protect the interests of the parties of the first part, the parties of the second part agree that they will pool all of the common stock of the new Barker Bros. corporation owned by them in a voting trust agreement with the Title Insurance and Trust Company, or other mutually satisfactory trust company as trustee, which said voting trust agreement shall be substantially in form set forth in Exhibit "B" attached hereto.

Whenever the parties of the first part shall cease to be the owners of a total of at least \$1,000,000.00 of the preferred stock of all classes originally issued to them, the right of the parties of the first part to participate in the selection or the removal of any president of Barker Bros. Incorporated (except as such right is given in the provisions of the preferred stock owned by them) and the rights conferred under the pooling agreement shall cease and determine.

5. It is understood and agreed that the first permanent Board of Directors of the new Delaware corporation shall be composed [43] of nine persons, as follows:

H. S. McKee, President.

C. H. Barker, Chairman of the Board.

C. A. Barker, Vice President.

C. Lawrence Barker, Vice President.

Erle P. Barker, Vice President.

H. E. Benedict.

F. K. Colby, Secretary-Treasurer.

Elvon Musick.

Joseph Rhodes.

It is understood and agreed that a temporary Board of Directors may be used for purposes of organization in the State of Delaware and to carry through the necessary steps to complete the plan herein provided for; but that the resignations of the members of said Board will be accepted as soon as said plan is carried through and said Delaware corporation organized, and that the first permanent Board of Directors will then be elected composed of the persons above named.

It is understood and agreed that this agreement and all of the obligations of the parties of the first part hereunder, or in any of the exhibits attached hereto and made a part hereof, are made subject to the approval of and necessary orders issued by the Superior Court of the County of Los Angeles, State of California, in the matter of the Estate of W. A. Barker, deceased, now pending in said court. In the event of such approval and/or orders cannot be obtained within the time specified, or upon terms not acceptable to the parties of the second part, then this agreement shall not be operative,

and all parties hereto shall be released from any obligations herein contained. [44]

PAULINE BARKER,
C. LAWRENCE BARKER,
F. K. COLBY,
Trustee.

CHAS. LAWRENCE BARKER,
Executor of the Estate of
W. A. Barker, Deceased.
C. L. BARKER,
Trustee.

Parties of the first part.

C. H. BARKER,
ERLE P. BARKER,
CLARENCE A. BARKER,

Parties of the Second [45]
part.

Exhibit "A"

Barker Bros., a corporation of California, has an outstanding capital stock, as of October 31, 1923, of \$575,000. par value of preferred stock and \$1,-789,435. (17,894.35 shares par value \$100.00 each) par value of common stock. Of this common stock, 8,183.69 shares is owned by Mr. C. Lawrence Barker; 8,183.69 shares by Messrs. C. H., C. A., and Erle P. Barker; and the remaining 1,526.97 shares by certain employees.

The following plan has been devised for the purpose of reorganizing the corporation, re-adjusting

the interests therein of the Messrs. Barker, and also for the purpose of re-incorporating under the laws of Delaware:

Plan

(1) A. Delaware corporation with Articles of incorporation and By-laws substantially as set forth in Exhibits "1" and "2" respectively, attached hereto, will be formed with a capital stock of \$10,000,000 par value common stock and \$2,500,000 First Preferred par value \$100.00, and \$2,500,000 Second Preferred \$100.00 par value, and the entire \$10,000,000 par value common stock thereof will be issued to the present holders of common stock of Barker Bros. Inc. in exchange and for the total outstanding common stock of the California corporation on a basis that after the exchange each stockholder of the California corporation will have the same proportionate stock holdings in the Delaware corporation as he now has in the California corporation. After this exchange is completed the Delaware corporation will hold all of the outstanding common stock of the California corporation and the \$10,000,000 par value outstanding common capital stock of the Delaware corporation will be held in the same percentages as the present Barker Bros. Inc. holdings are held by the stockholders thereof.

(2) Another corporation will be formed under the laws of Delaware to be known as "Lawrence Barker, Inc." with power and [46] authority to purchase, hold and generally deal in securities and this corporation is hereinafter referred to as the "Securities Company." It will have an authorized

capital stock of \$. par value, either all of one class or of such classification, preferred and common stock as Mr. Lawrence Barker shall determine. Upon the formation of this corporation, Mr. Lawrence Barker will transfer to it his stock holdings in the Delaware Corporation, namely shares (\$. par value) of Common stock of the Delaware corporation, for all of the authorized capital stock of the Securities Company, viz: \$. par value. When this transaction is completed, the Securities Company will hold shares of Common stock of the Delaware corporation and Mr. Lawrence Barker, in lieu of holding said stock will hold all of the stock of the Securities Company.

(3) The respective Preferred stocks will contain terms and provisions set forth in Exhibit "3" attached hereto. The Delaware corporation will deliver \$2,087,000.00 First Preferred and \$2,300,000.00 Second Preferred stock to the Securities Company in exchange for all of the Common stock of the Delaware corporation held by the Securities Company. Upon the delivery to the Delaware corporation by the Securities Company of all of its Common stock, the latter company will expressly assume all stockholder's liability of C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee, for all indebtedness of the present Barker Bros. Inc., a California corporation, and the Delaware corporation shall agree to indemnify and save harmless

said above named persons of and from any and all such liability. In other words, the Delaware corporation will in effect exchange its outstanding par value stock (held by the Securities Company) into \$2,087,000.00 First Preferred stock, and \$2,300,000.00 Second Preferred stock. When these transactions are completed the Delaware [47] corporation will have outstanding \$2,087,000.00 First Preferred stock, \$2,300,000.00 Second Preferred stock, and \$5,426,662.61 Common stock; and the Securities Company will own only preferred stock, having then no common stock interest whatever in the Delaware corporation.

(4) After the foregoing transactions are consummated, the Delaware corporation will have outstanding \$2,087,000.00 First Preferred Stock, \$2,300,000.00 Second Preferred stock, and \$5,426,662.61 common stock. It will then put through the following transactions:

(a) It will amend its certificate of incorporation so as to change its common stock from par value to no par value and issue 100,000 shares of no par value common stock in exchange for this outstanding \$5,426,662.61 par value of common stock.

(b) The California corporation will call (or will have previously purchased) its outstanding preferred stock for redemption, and having called this stock, it will be appropriate action on the part of its directors and stockholders, sell and convey all of its business and assets to

the Delaware corporation and in consideration therefor, the Delaware corporation will (1) pay the California corporation an amount of cash equal to the redemption price of the preferred stock then outstanding; (2) will assume all of the obligations of the California corporation, and (3) will surrender for cancellation all of the outstanding common stock of the California corporation or credit thereon the receipt of the assets of the California corporation remaining after the payment of its debts, the redemption price of the [48] preferred stock as a liquidating dividend.

(c) The Delaware corporation will comply with the laws of California so as to entitle it to do business as a foreign corporation in said state, and will thereafter conduct the business. The California corporation may be dissolved when convenient.

(d) In the meantime in order to raise the funds necessary to redeem the existing preferred stock of the California corporation, the Delaware corporation will sell \$413,000.00 of the First Preferred stock to bankers.

(5) The Securities Company as the holder of \$1,087,000.00 First Preferred stock will sell the same to bankers, the same to be sold to the bankers along with the remaining \$413,000.00 First Preferred stock above mentioned. The Securities Company will grant to the bankers an option for the period of 120 days from and after the delivery of

said preferred stock or interim or temporary certificates thereof to the Securities Company, to purchase all or any of said remaining \$1,000,000.00 par value of First Preferred stock at the price of 92, and the Securities Company will further agree with the bankers that if at any time within eight (8) months after the expiration of said option of 120 days, it shall have a bona fide offer or offers for the purchase of said stock, it, the Securities Company, will at once notify the bankers of such offer and the price and terms thereof, and the bankers shall thereupon have fifteen (15) days from and after the receipt of such notice to purchase said stock upon the same price and terms. Upon demand, and as a part of said transaction Barker Bros. Inc., will pay to the Securities Company a discount amounting to the number of points less than par for which said stock may be sold. not exceeding, however, a discount of eight (8) points, such payment to be made by Barker Bros. [49] Inc. to the Securities Company at the time such sale is consummated. [50]

Exhibit 4

December 20, 1923

Messrs. C. H. Barker,
Clarence A. Barker,
Erle P. Barker, and
C. Lawrence Barker,
Los Angeles, California

Gentlemen:

It is our understanding that a corporation to be known as Barker Bros. Incorporated (hereinafter sometimes referred to as "the Company") will be organized under the laws of Delaware, with authorized capital stock of \$15,000,000.00, divided into \$2,500,000.00 First Preferred, \$2,500,000.00 Second Preferred, and \$10,000,000.00 par value common; and that said corporation will acquire in exchange for all of its common stock all of the outstanding common stock of the present Barker Bros. Inc. of California.

We understand also that a separate Delaware corporation (hereinafter referred to as the Securities Company) will be organized, to be owned and controlled by Mr. C. Lawrence Barker, and that he will transfer to said corporation all of the common stock of Barker Bros. Incorporated issued to him in exchange for his present stock of Barker Bros. Inc. of California; and that thereupon the Delaware company will issue to him \$2,087,000.00 aggregate par value of its First 7½% Preferred Stock and \$2,300,000.00 of its Second Preferred Stock, so that after said arrangement has been completed the capitalization of Barker Bros. Incorporated of Delaware will be as follows:

	Authorizing	Outstanding
7½% First Preferred Stock.....	\$2,500,000.00	\$2,087,000.00
7% Second Preferred Stock.....	2,500,000.00	2,300,000.00
Common Stock	10,000,000.00	5,426,662.61

It is also our understanding that subsequently the [51] \$5,426,662.61 par value of the common stock

outstanding will be converted into 100,000 shares of no par value common stock by amendment of the Articles of Incorporation of the Delaware corporation.

Subject to the consummation of the foregoing transactions and the working out and approval of the details thereof by counsel for the respective parties, we hereby offer to purchase from Barker Bros. Incorporated the \$413,000.00 First Preferred stock remaining unissued and to purchase from the Securities Company \$1,087,000.00 principal amount of the 7½% First Preferred Stock of Barker Bros. Incorporated at 92 and accrued dividends, upon the following terms, conditions, representations and warranties, namely:

1. The Securities Company will grant to the bankers an option for the period of one hundred twenty (120) days from and after the delivery of said preferred stock or interim or temporary certificates thereof to the Securities Company, to purchase all or any of said remaining \$1,000,000.00 par value of First Preferred stock at the price of 92, and the Securities Company will further agree with the bankers that if at any time within eight (8) months after the expiration of said option of one hundred twenty (120) days, it shall have a bona fide offer or offers for the purchase of said stock, it, the Securities Company, will at once notify the bankers of such offer and the price and terms thereof, and the bankers shall thereupon have fifteen (15) days from and after the receipt of such notice

to purchase said stock upon the same price and terms. Upon demand and as a part of said transaction, Barker Bros. Inc. will pay to the Securities Company a discount amounting to the number of points less than par for which said stock may be sold, not exceeding, however, a discount of eight (8) points, such payments to be made by Barker Bros. Inc. to the Securities Company at the time such sale is consummated.

2. The authorized amount of the 7½% First Preferred stock shall not exceed \$2,500,000. [52]

3. The provisions of the First and Second Preferred and Common stock shall conform to the provisions set forth in Exhibit "A" hereto attached.

4. Stock certificates are to be interchangeably transferable in New York and Los Angeles. In New York the Mechanics and Metals Bank will be appointed transfer agent and the same party will be appointed registrar. In Los Angeles the Pacific Southwest Trust and Savings Bank or Security Trust & Savings Bank will be appointed transfer agent and the same party will be appointed registrar.

5. The Company will agree that so long as any of the First Preferred stock remains outstanding

(a) We shall have a representative designated by us on the Board of Directors of the Company.

(b) We shall agree with the Company on a man who shall be president of the Company.

6. The Company will furnish us within 45 days of the close of each calendar month, an officially certified consolidated income account for such month, consolidated balance sheet at the close of such month with reasonable detail, and such other information as we may reasonably request from time to time with reference to the operation, business and financial condition of the Company and its subsidiary companies. Within 90 days after the close of each calendar year the Company will furnish us with a detailed balance sheet showing the financial condition of the Company for the close of such year and a detailed income account for the close of such year, same to be made by a certified public accountant, if requested by us.

7. All costs and expenses in connection with and incidental to the issue of the First Preferred stock including the preparation and issue of temporary and definitive stock certificates and interim certificates, if any, and all charges and expenses in connection with the issue of such interim receipts, stamp taxes [53] and other taxes and counsel fees, including those of our counsel, as well as the compensation and expenses of the Transfer agents and Registrars, will be paid by the Company.

8. In order to qualify the First Preferred stock under the so-called Blue Sky Laws in States, in which we or any members of the selling syndicate or group, which we may form, may desire to offer this stock for sale, the Company will register as a foreign corporation and file the acceptance of service required and will otherwise cooperate with

us to the extent necessary in order to comply with the laws of such state and in connection therewith will, upon request and without cost to us, furnish us with all such certificates, statements, and other instruments or papers as may be required to comply with such laws, and will also cooperate with us in the preparation of descriptive sale circulars and furnish us a letter, signed by the president of the Company, to accompany such circular and containing such information and data as we may reasonably request, and the First Preferred stock shall conform to all statements and representations which may be contained in such circular or letter, such circular and descriptive letter to be first approved by the Company and its counsel before being set out.

9. The Company will furnish, or cause to be furnished to us, opinions of counsel approved by us, approving the validity of the First Preferred stock and will also furnish, or cause to be furnished to us, all legal papers, instruments, etc., requested by us in connection with this transaction.

10. The Company will deliver to us either stock certificates in temporary form of interim certificates therefor, on or about February 1, 1924, such date to be subject to extension only with our written consent. In the event that the interim certificates shall be issued, the stock certificates, either in temporary or definitive form, shall be issued and delivered to release the funds deposited under the interim certificates, not later than July 1, 1924, subject to our right to extend such date. In the event

that interim certificates are issued and subsequently stock certificates in temporary or definitive form are not issued and delivered for exchange for the interim certificates, your company will indemnify and save us harmless from any and all damages, liability, expenses and commissions which may arise or which we may incur by reason of such failure to deliver, but in no event to exceed \$10,000.00 in amount. If no interim certificates are issued, no amount whatever for such purposes shall be payable to us.

11. All legal matters in connection with this transaction including the validity and legality of the First Preferred Stock and the incorporation and organization of the Company, shall be subject to the approval of our counsel, who shall draw the form of the stock certificates.

12. The Company will immediately take all corporate and other legal proceedings which may be necessary to authorize the issue of the First Preferred Stock and interim receipts and will take all and every other step and action requisite to consummate this transaction.

13. Messrs. C. H., Clarence A. and Erle P. Barker will hold themselves responsible for the execution of the foregoing provisions pertaining to Barker Bros. Incorporated, and Mr. C. Lawrence Barker will hold himself responsible for the execution of those provisions pertaining to Securities Company. It being understood, however, that the liability of the respective parties under this agreement is contingent upon the successful working out

of the contract now being negotiated between Messrs. C. H., Clarence A. and Erle P. Barker on the one hand, and the interests represented by C. Lawrence Barker on the other hand.

14. It is understood that this agreement is subject to the furnishing of a satisfactory full audited report of the affairs [55] of the Company.

15. This offer must be accepted on or before December 31st, 1923, or same shall be deemed withdrawn.

16. It is understood by us that as soon as said corporations are formed the respective rights and liabilities of Messrs. C. H., Clarence A. and Erle P. Barker under this agreement may be assigned to and assumed by Barker Bros. Incorporated, and the respective rights and liabilities of Mr. C. Lawrence Barker may be assigned to and assumed by the Securities Company.

This letter, when accepted by you, within the time specified, will constitute a contract between us.

Yours very truly,

MARSHALL FIELD, GLORE,
WARD & CO.,

By /s/ A. L. WITHERS.

Accepted this 20th day of December, 1923.

/s/ C. H. BARKER,

/s/ ERLE P. BARKER,

/s/ CLARENCE A. BARKER,

/s/ C. LAWRENCE BARKER.

Exhibit 5

Minutes of First Meeting of Board of Directors
of Lawrence Barker, Incorporated

The Board of Directors of Lawrence Barker, Incorporated, met at Room 1111 Merchants National Bank Building, in the City of Los Angeles, State of California, on the 27th day of December, 1923, at the hour of 10 o'clock A.M., pursuant to the following consent signed by all of the Directors of said corporation, to wit:

Waiver and Consent

We, the undersigned, being all of the incorporators named in the Articles of Incorporation of Lawrence Barker, Incorporated, and all of the subscribers of the capital stock of said Corporation, and being all the directors named in said Articles of Incorporation, to serve for one year from and after its incorporation, or until our successors are elected, do hereby waive notice of a meeting of said directors to be held on the 27th day of December, 1923, at 10 o'clock A.M., at the office of the Corporation, in the City of Los Angeles, County of Los Angeles, State of California, and we do hereby consent to the holding of said meeting at said time and place for the transaction of any and all business which may be brought before said meeting.

Dated: December 27th, 1923.

H. F. PRINCE,
RICHARD L. NORTH,
JAS. A. GIBSON, JR.

Present: Directors Richard L. North and Jas. A. Gibson, Jr.

Absent: Director H. F. Prince.

The meeting was called to order by Director Richard L. North, who acted as temporary chairman, and thereupon Director Jas. A. [57] Gibson was elected temporary Secretary. Thereupon, the Board organized by electing unanimously the following officers:

President.....H. F. Prince

Vice-President.....Richard L. North

Secretary-Treasurer...Jas. A. Gibson, Jr.

Whereupon, Richard L. North, Vice-President, in the absence of the President, acted as Chairman of the meeting, and Jas. A. Gibson, Jr., Secretary of the company, acted as secretary.

There was then laid before the meeting the Certificate of Incorporation showing due incorporation of this corporation on the 22nd day of December, 1923, and also a certified copy of the Articles of Incorporation showing the filing of the original Articles with the Secretary of State on the 24th day of December, 1923, and the filing of a copy of said Articles certified by the Secretary of State in the office of the County Clerk of Los Angeles County, said county being the county in which the principal place of business of the corporation is situated.

On motion duly made, seconded and unanimously

carried, the following four resolutions were then adopted:

I.

Resolved: That this Board of Directors adopt, and there is hereby adopted the seal of the corporation bearing the words "Lawrence Barker, Incorporated, incorporated 1923 California," and having the design shown by the imprint thereof upon this page.

II.

Resolved: That the stock certificate of this corporation be signed by the President and Secretary, and that said certificate be in the following [58] form:

Incorporated Under the Laws of
the State of California

Number Shares

Lawrence Barker, Incorporated

Capital Stock \$2,000,000.00

Par Value \$100.00 each

This Certifies That
is the owner of shares of the capital
stock of Lawrence Barker, Incorporated, transfer-
able only on the books of the corporation in person
or by attorney on surrender of this certificate
properly endorsed.

In Witness Whereof, the corporation has caused
this certificate to be signed by its duly authorized

officers, and its corporate seal to be hereunto affixed
this day of, 19....

.....

Secretary.

President.

and

Be It Further Resolved: That pending the preparation of the engraved or printed certificates, the said stock certificates may be issued in typewritten form marked "Temporary Certificate," engraved or printed certificates to be obtained by the officers of the corporation and substituted therefor upon the surrender and cancellation of the temporary form of certificate duly endorsed.

III.

Resolved: That unless and until otherwise ordered by the Board of Directors, the regular meetings thereof be held on the 20th day of each month, at the hours of 2 o'clock P.M., at the office of [59] the corporation.

IV.

Resolved: That unless and until otherwise ordered by the Board of Directors, the office of this corporation shall be at 1111 Merchants National Bank Building, in the City of Los Angeles, State of California.

Thereupon, the Vice-President presented to the meeting the permit of the Commissioner of Corporations of the State of California, dated December 26th, 1923, permitting this corporation

"To sell and issue one share of its capital

stock to each of its three incorporators at par, for cash, lawful money of the United States, so as to net applicant the full amount of the selling price thereof.”

Thereupon, upon motion duly made, seconded and unanimously carried, said permit of the Commissioner of Corporations was ordered filed with the Secretary and the Vice-President and Secretary of the corporation were authorized and directed to issue to H. F. Prince, Richard L. North and Jas. A. Gibson, Jr., one share each of the capital stock of the corporation, and upon payment by each of them of \$100.00 par value thereof, to deliver temporary certificates of the capital stock of this corporation to each of the above named.

There being no further business to come before the meeting, it was, upon motion duly made, seconded and unanimously carried, adjourned.

JAS. A. GIBSON, JR.,
Secretary. [60]

Exhibit 6

Barker Bros. Incorporated

Minutes of First Meeting of the Board of Directors

December 28, 1923

The first meeting of the Board of Directors of Barker Bros. Incorporated, was held on the 28th day of December, 1923, at 4:40 o'clock P.M. at 61 Broadway, New York City.

Present were Messrs. Warren B. Pinney, Henry F. Prince and Harry E. Benedict, being all of the

Directors of the Corporation and therefore a quorum.

Mr. Warren B. Pinney, the President, called the meeting to order and presided. Mr. Henry F. Prince was appointed Secretary of the meeting and kept the minutes.

The Secretary presented a written Call and Waiver of Notice pursuant to which the meeting was held, signed by all of the Directors and specifying the objects and purposes thereof, which was ordered filed with the minutes of the meeting.

The Chairman reported that at the first meeting of the Incorporators held this day, Mr. Warren B. Pinney had been elected President of the Corporation.

In addition to the office of President, the Chairman suggested that three officers be elected at this time, namely, a Secretary, Treasurer, and Assistant Treasurer, and thereupon, upon motion duly made and seconded, and upon the affirmative vote of all the Directors, the meeting so decided. Thereupon, Mr. Prince was nominated for the office of Secretary and also for the office of Treasurer, and Mr. Elvon Musick was nominated for the office of Assistant Treasurer. No further nominations were made, and the nominations were, on motion duly made and seconded, closed; and thereupon Mr. Prince was duly elected both Secretary and Treasurer of the [61] Corporation, and Mr. Musick was duly elected Assistant Treasurer of the Corporation, and the Chairman so declared. Thereupon Mr.

Prince took and subscribed the oath prescribed by law for the faithful performance of his duties as Secretary, and was directed to file the same with the minutes of the meeting.

Upon motion duly made and seconded and unanimously carried, the following resolution was duly adopted:

Resolved, That action be postponed until a later meeting of the Board on the question of the amount of bond to be given by the Treasurer of this Corporation, and that pending such action no bond be required.

Upon motion duly made and seconded, and by the affirmative vote of all the Directors, the following resolution was duly adopted:

Resolved, that the forms of Temporary Stock Certificates for the First Preferred, Second Preferred and Common stock, respectively, of this Corporation, presented at this meeting be and the same are hereby approved and adopted.

Upon motion duly made and seconded, and unanimously carried, the following resolution was duly adopted:

Resolved, that the Seal, the impression whereof is herewith affixed on the margin of these minutes, be and the same is hereby adopted as the corporate seal of this Corporation.

[Seal]

Mr. Prince presented his written resignation as a Director of the Corporation to take effect upon the

pleasure of this Board of Directors; whereupon, upon motion duly made and seconded, and by the affirmative vote of all the Directors, the following resolution was duly adopted: [62]

Resolved, that the resignation of Mr. Prince as a Director of this Corporation be and the same is hereby accepted; and that Mr. Garrett A. Brownback be and he is hereby elected to fill the vacancy thus created, and to serve until the election and qualification of his successor.

Mr. Garrett A. Brownback thereupon took his place at the Board. Mr. Prince continued to act as Secretary of the meeting.

Upon motion duly made and seconded, and unanimously carried, the following resolutions were duly adopted:

Resolved, that the Corporation Trust Company of America be and is hereby appointed the agent of this Corporation, in charge of the principal office in Delaware and of the books required by law to be kept in that office, and the agent upon whom process against this Corporation may be served in accordance with the laws of Delaware; and be

Further Resolved, that said Trust Company may apply to and act upon the instructions of Messrs. Musick, Burr and Pinney, of Los Angeles, California, the counsel of this Corporation, in respect to any questions arising in connection with said agency; and be it

Further Resolved, that the Secretary be and is hereby authorized to sign, and seal with the Corporation's seal, a certificate of authorization to said

Trust Company in the form submitted at this meeting; and be it

Further Resolved, that the Treasurer be and he is hereby authorized to pay all fees and expenses incident to and necessary for the organization of the Corporation.

Upon motion duly made and seconded, and unanimously carried the following resolution was adopted:

Resolved, that the proper officers of this Corporation [63] be and they are hereby authorized and directed on behalf of the Corporation, and under its corporate seal to make and file such certificate, report or other instrument as may be required by law to be filed in any state, territory or dependency of the United States or in any foreign country in which said officers shall find it necessary or expedient to file the same, to authorize the Corporation to transact business in such state, territory, dependency or foreign country.

The Chairman stated that the Corporation was formed for the purpose of reorganizing Barker Bros. Inc., a corporation of the State of California, and readjusting the interests of the stockholders therein. He stated that Barker Bros. Inc., the California corporation, has an outstanding capital stock of \$2,364,435.00 par value, consisting of \$575,000.00 par value of Preferred Stock and \$1,789,435.00 par value of Common Stock, and presented a balance sheet thereof showing its financial condition as of the close of business on November 30, 1923. All of the Directors, except Mr. Brownback, were familiar with the financial condition and af-

fairs of the California Corporation, the value of its business, properties and assets and its earnings history.

The Chairman thereupon presented written proposals signed by the holders of the entire issued and outstanding Common Stock of Barker Bros. Inc. wherein and whereby, upon the terms and conditions therein respectively set forth, they offered to exchange their holdings of such Common Stock for \$9,569,700 par value of the Common Stock of this Corporation. Thereupon, after consideration, the following preambles and resolutions were presented and the adoption thereof duly moved and seconded:

Whereas, the holders of the entire issued and outstanding Common Capital Stock, aggregating \$1,789,435 [64] par value, of Barker Bros. Inc., a corporation of the State of California, have by written proposals dated December 28, 1923, offered to exchange their said holdings for \$9,569,700 par value of the Common Capital Stock of this Corporation upon the terms and conditions respectively set forth in said proposals, true and correct copies of which are as follows: [65] and

Whereas, the proposals above set forth made by C. Lawrence Barker, Pauline Barker, Chas. Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased, C. L. Barker as Trustee, and F. K. Colby as Trustee, have been made upon the further condition, in addition to the terms and provisions therein set forth, that this Corporation

shall enter into with them an agreement, in the form submitted at this meeting, wherein and whereby this Corporation shall assume all of their and each of their liability as stockholders of said Barker Bros. Inc. arising, or that may arise, out of any indebtedness of said Barker Bros. Inc., and to indemnify them save them harmless of and from any and all such liability, a true and correct copy of which form of agreement is as follows: [66] and,

Whereas, in the judgment of this Board of Directors it is to its interest and also necessary for the accomplishment of its corporate purposes that it acquire the entire outstanding Common Stock of Barker Bros. Inc., a California corporation as aforesaid, and said Common Stock of said corporation is of a value to this Corporation of at least \$9,569,700;

Now, Therefore, be it

Resolved, that this Board of Directors does hereby adjudge and determine that the entire issued and outstanding common capital stock of Barker Bros. Inc., a California corporation, aggregating \$1,789,435 par value, is of a value to this Corporation of at least \$9,569,700; and be it

Further Resolved, that the proposals hereinabove recited be and the same are hereby accepted upon the terms and conditions therein respectively set forth, and that the President of this Corporation be and is hereby authorized and empowered, in its name and for its account, to evidence such acceptance thereof on behalf of this Corporation, and that

the Secretary of this Corporation be and he is hereby authorized and directed to affix the seal of this Corporation to each such acceptance and thereupon duly attest the same; and be it

Further Resolved, that this Corporation enter into an agreement, the same to bear date December 28, 1923, by and between this corporation as party of the first part, and C. Lawrence Barker, Pauline Barker, Chas. Lawrence Barker as Executor of the Estate of W. A. Barker, deceased, C. L. Barker as Trustee, and F. K. Colby as Trustee, as parties of the second part, providing for the assumption and agreement of indemnity hereinabove referred to, said agreement to be in the form hereinabove in the preambles to these resolutions recited and set forth at length, and that said [67] agreement be executed in the name and for the account of this Corporation by its President or a Vice President, with its corporate seal thereunto affixed duly attested by its Secretary or an Assistant Secretary; and be it

Further Resolved, that the proper officers of this Corporation be and they are hereby authorized, empowered and directed, in its name and for its account, as and when the certificates duly endorsed in blank for transfer representing the issued and outstanding common stock of Barker Bros. Inc., said California corporation, are delivered to this Corporation in accordance with said proposals, to issue and deliver in exchange therefor, upon the basis and terms set forth in said respective proposals, certificates for fully paid and non-assessable

Common Stock of this Corporation to the amounts respectively required by the terms and provisions of said proposals; and be it

Further Resolved, that the Treasurer or an Assistant Treasurer of this Corporation be and he is hereby authorized, empowered and directed, in its name and for its account, to accept delivery to this Corporation of the certificates for the issued and outstanding Common Capital stock of said Barker Bros. Inc., a California Corporation as aforesaid; and be it

Further Resolved, that the \$9,569,700 par value of the Common Capital Stock of this Corporation, when certificates therefor shall be issued and delivered as hereinabove in these preambles and resolutions provided, shall be fully paid and non-assessable; and be it

Further Resolved, that the officers of this Corporation be and they are hereby authorized, empowered and directed in its name and for its account to take any and all such action, to make any and all such payments, and to execute, acknowledge and deliver all such instruments as may be necessary, proper and convenient [68] in their judgment in order to carry out the intendment of these resolutions and the terms and provisions of said proposals and agreement.

A vote was thereupon taken for or against the adoption of the foregoing preambles and resolutions. Mr. Pinney and Mr. Benedict voted in favor of the adoption thereof. Mr. Brownback, because of his unfamiliarity with the properties in question,

refrained from voting. The Chairman thereupon declared the foregoing preambles and resolutions duly adopted.

No further business was presented, and the meeting on motion adjourned.

HENRY F. PRINCE,
Secretary. [69]

Agreement

This Agreement made and entered into this 28th day of December, 1923, by and between Barker Bros. Incorporated, a Delaware corporation, party of the first part, and C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee, all of the City of Los Angeles, California, parties of the second part.

Witnesseth:

Whereas the parties of the second part under the terms of a certain agreement made the 20th day of December, 1923, have upon the terms and conditions therein set forth agreed to exchange and transfer to the party of the first part all of the common capital stock owned by said parties of the second part in Barker Bros. Inc., a California corporation.

Now Therefore, it is agreed between the parties as follows:

That for and in consideration of the exchange and transfer by the parties of the second part to

the party of the first part of all the common stock of said Barker Bros. Inc., the party of the first part hereby agrees to and does assume all of the liability of the parties of the second part, or either of them, as stockholders of said Barker Bros. Inc. arising, or that may arise, out of any indebtedness of said Barker Bros. Inc. to and including the date of this agreement; and party of the first part hereby agrees to indemnify and save harmless the said parties of the second part, and each of them, of and from any and all such liability.

In Witness Whereof the parties hereunto have executed this [70] agreement this 28th day of December, 1923.

BARKER BROS.

INCORPORATED,

By,

.....,

Party of the First Part.

PAULINE BARKER,

C. LAWRENCE BARKER,

Trustee,

C. LAWRENCE BARKER,

Executor,

F. K. COLBY,

Trustee. [71]

December 28, 1923

Barker Bros. Incorporated,
A Delaware Corporation
Gentlemen:

The undersigned, owning and/or controlling 8179.69 shares of the common capital stock of Barker Bros. Inc., a California corporation, hereby offer to sell, assign and transfer all of said stock to your corporation in exchange for 43,870 shares of the common stock of Barker Bros. Incorporated, a Delaware corporation.

Upon your acceptance of this offer at the place provided below, this offer and acceptance will constitute an agreement between us for the exchange of said stock, and same will be endorsed for transfer to your company, or order, at any agency directed by you.

You will please issue the \$4,387,000.00 par value of the common stock of your company in the name of "Lawrence Barker, Incorporated."

CHAS. LAWRENCE BARKER,
Executor of the Estate of
W. A. Barker, Deceased.

C. LAWRENCE BARKER,
C. L. BARKER,
Trustee.

F. K. COLBY,
Trustee.

PAULINE BARKER.

The above offer is hereby accepted:

BARKER BROS.
INCORPORATED,

By,

Attest:

.....,

Secretary. [72]

December 28, 1923

Barker Bros. Incorporated,
A Delaware Corporation

Gentlemen:

The undersigned, owning and/or controlling 226 shares of the common capital stock of Barker Bros. Inc., a California corporation, hereby offer to sell, assign and transfer all of said stock to your corporation in exchange for 935 shares of the common stock of Barker Bros. Incorporated, a Delaware corporation.

Upon your acceptance of this offer at the place provided below, this offer and acceptance will constitute an agreement between us for the exchange of said stock, and same will be endorsed for transfer to your company, or order, at any agency directed by you.

You will please issue the \$93,500.00 par value of the common stock of your company in the name

of J. W. Beam and Martha B. Beam, as joint tenants, with the right of survivorship.

J. W. BEAM,

MARTHA B. BEAM.

The above offer is hereby accepted:

BARKER BROS.

INCORPORATED.

By,

Attest:

.....,

Secretary. [73]

December 28, 1923

Barker Bros. Incorporated,

A Delaware Corporation

Gentlemen:

The undersigned, owning and/or controlling 9488.66 shares of the common capital stock of Barker Bros. Inc., a California corporation, hereby offer to sell, assign and transfer all of said stock to your corporation in exchange for 50,892 shares of the common stock of Barker Bros. Incorporated, a Delaware corporation, and the assumption by you and payment by you of the expenses, commissions and fees incurred by the undersigned in connection with the reorganization of Barker Bros. Inc., the readjustment of the stockholders' interests therein, and the issue of the preferred stock of your company through Marshall Field, Glore, Ward & Co., bankers.

Upon your acceptance of this offer at the place provided below, this offer and acceptance will con-

stitute an agreement between us for the exchange of said stock, and same will be endorsed for transfer to your company, or order, at any agency directed by you.

C. H. BARKER,
CLARENCE A. BARKER,
E. P. BARKER.

The above offer is hereby accepted:

BARKER BROS.
INCORPORATED,

By,

Attest:

.....,

Secretary.

P.S. The 50,892 shares of Common Stock above mentioned include the shares subscribed for by the Incorporators, assignments of the subscriptions whereof we hold. [74]

Barker Bros. Incorporated

First Meeting of Directors

Call and Waiver of Notice

We, the undersigned, being all of the Directors of Barker Bros. Incorporated, a corporation of the State of Delaware, do hereby call the first meeting of the Board of Directors thereof to be held on the 28th day of December, 1923, at 4:40 o'clock P.M. at 61 Broadway, New York City, for the purpose of completing the organization of the corporation, the acquisition of property, the issue of stock and the transaction of any and all such other and fur-

ther business as may properly come before the meeting; of which meeting we hereby waive all requirements of notice of the time, place and objects thereof.

WARREN B. PINNEY,
HARRY E. BENEDICT,
HENRY F. PRINCE. [75]

Secretary's Oath

State of New York,
County of New York—ss.

I, Henry F. Prince, do solemnly promise and swear that I will faithfully, impartially and justly perform the duties of Secretary of Barker Bros. Incorporated, a corporation of the State of Delaware, according to the best of my abilities and understanding. So help me God.

HENRY F. PRINCE.

Subscribed and sworn to before me this 28th day of December, 1923.

A. L. FIELD,

Notary Public, New York Co.

Commission expires March 30, 1925. [76]

December 28, 1923

Barker Bros. Incorporated,
Los Angeles, California

Gentlemen:

I hereby tender my resignation as a Director of your corporation to take effect upon the pleasure of your Board.

Yours very truly,

HENRY F. PRINCE. [77]

Exhibit 7

Minutes of a Special Meeting of the Board of
Directors of Lawrence Barker, Incorporated

The Board of Directors of Lawrence Barker, Incorporated, met at Room 1111 Merchants National Bank Building, in the City of Los Angeles, State of California, on the 28th day of December, 1923, at the hour of 10 o'clock a.m. pursuant to the following consent signed by all of the Directors of said corporation, to-wit:

Waiver of Notice and Consent

The undersigned directors of Lawrence Barker, Incorporated do hereby consent to the holding of a meeting at the Board of Directors of said Corporation, at Room 1111 Merchants National Bank Building, in the City of Los Angeles, California, on the 28th day of December, 1923, at the hour of 10 o'clock a.m., for the purpose of considering and acting upon any and all business which may be brought before said meeting, and we do hereby waive any and all notice of such meeting:

Dated: December 28th, 1923.

H. F. PRINCE,
JAS. A. GIBSON, JR.,
RICHARD L. NORTH.

Present: Directors Richard L. North and Jas. A. Gibson, Jr.

Absent: Director H. F. Prince.

In the absence of the President, Richard L.

North, Vice-President presided and Jas. A. Gibson, Jr., Secretary of the Company, acted as Secretary.

The Vice-President stated that this corporation had been formed, among other things, to buy, sell, hold, lease and in every other way acquire, dispose of, deal in and with property of every [78] kind and nature whatsoever, both real and personal, and including in addition to all other kinds of property, stocks and bonds of corporations, both private and municipal, notes, mortgages, and every other class and kind of securities whatsoever, and that an offer in writing had been received from C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee, to exchange \$4,387,000. par value of the common capital stock of Barker Bros. Incorporated, a Delaware corporation, for 19,997 shares of the capital stock of this corporation fully paid, their offer being in words and figures as follows:

Los Angeles, California, December 28, 1923.

Lawrence Barker, Incorporated,

Los Angeles, California

Gentlemen:

The undersigned have just concluded the exchange of a total of 8,183.69 shares of the capital stock of Barker Bros. Inc., a California corporation, for \$4,387,000. par value of the common capital stock of Barker Bros. Incorporated, a Delaware corporation.

We and each of us hereby offer to cause the said \$4,387,000. par value of the capital stock of said last

named company, viz: 43,870 shares thereof, of the par value of \$100. each to be transferred to Lawrence Barker, Incorporated, fully paid, in exchange for 19,997 shares of your company, to be issued fully paid to the undersigned in the following proportions:

C. Lawrence Barker.....	4,504.13 shares
Pauline Barker	4,062.24 shares
C. L. Barker, Trustee.....	2,350.23 shares
Chas. Lawrence Barker, Executor of the Estate of W. A. [79] Barker, deceased	8,353.67 shares
F. K. Colby, Trustee.....	726.73 shares

You will please advise us immediately if the foregoing offer is acceptable to you, and if so, obtain the necessary permit of the corporation Commissioner of the State of California for the issuance of said stock to the undersigned on the above consideration.

C. LAWRENCE BARKER,
PAULINE BARKER,
C. L. BARKER,
Trustee,

C. LAWRENCE BARKER,
Executor of the Estate of
W. A. Barker, Deceased.

F. K. COLBY,
Trustee.

It was stated by the Vice-President that the owners and holders of all the subscribed and issued common capital stock of Barker Bros. Inc., a California corporation (excepting directors' shares), including C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee, have transferred their holdings of said common stock to Barker Bros. Incorporated, a Delaware corporation, in exchange for all of the common capital stock of said Delaware corporation (excepting directors' qualifying shares); that said Delaware corporation is now the owner of all of the common capital stock of Barker Bros. Inc., a California corporation; and that \$4,387,000. par value of the common stock of said Delaware corporation, to which said C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee, are entitled in the proportions set forth in their foregoing offer to this corporation presented at this meeting, are fully worth the consideration demanded therefor, namely: 19,997 [80] shares of the capital stock of this corporation.

There was then presented to this meeting a financial statement of said Barker Bros. Inc., a California corporation, as of November 30th, 1923, duly attested by the Vice-President of that company, from which it appeared that the book value of the common stock of said company is now not less than the sum of \$335.99 per share.

The Vice-President then stated that the sole assets at this date of said Barker Bros., Incorporated, a Delaware corporation, consists of all of the subscribed and issued common capital stock of Barker Bros. Inc., a California corporation, totaling 17,894.35 shares thereof, which, according to the financial statement of said company presented at this meeting, have an aggregate book value of \$6,012,318.63. Therefore, when issued, said \$10,-000,000. par value of the common capital stock of said Barker Bros. Incorporated, a Delaware corporation will, based on the financial statement of said Barker Bros. Inc., a California corporation, have a book value of \$60.12 per share. It, therefore, appears that 43,870 shares of said common capital stock of said Delaware corporation have an aggregate book value of \$2,749,490.20, which said C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee now offer to exchange for 19,997 shares of the capital stock of this corporation, par value \$100.

Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved: That the foregoing offer presented at this meeting of the Board of Directors by C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased [81] and F. K. Colby, Trustee, to exchange 43,870 shares of Barker Bros. Incorporated, A Delaware corporation, for 19,997 shares of the capital stock of this corpora-

tion in the proportion to each set forth in said offer be, and the same is hereby accepted by this corporation; that the said 43,870 shares of said Barker Bros. Incorporated, a Delaware corporation, is fully worth the consideration demanded therefor, it appearing to this Board of Directors that said stock is worth in excess of the consideration demanded therefor, and that believing this to be so, that due showing of the value of the consideration to be received by this corporation in exchange for its said stock be made to the Corporation Commissioner of the State of California; and

Be It Further Resolved: That the Vice-President and Secretary of this corporation be, and they are hereby authorized, for and on behalf of this corporation, to make application to the Corporation Commissioner of the State of California to issue to said C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased and F. K. Colby, Trustee, shares of its capital stock, but not exceeding in the aggregate to any or all of them 19,997 shares, and that upon said permit of the corporation Commissioner having been issued to this corporation, the Vice-President and Secretary of this corporation be, and they are hereby authorized and directed to issue to

Lawrence Barker, Incorporated

C. Lawrence Barker.....	4,504.13 shares
Pauline Barker	4,062.24 shares
C. L. Barker, Trustee.....	2,350.23 shares

Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, de- ceased	8,353.67 shares
F. K. Colby, Trustee	726.73 shares

all in accordance with said permit of the Corpora-
tion Commissioner.

There was then presented to the meeting a communication from Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, stating that the Estate of W. A. Barker deceased is the owner of 18,327.30 shares of said 43,870 shares of the common stock of said Barker Bros. Incorporated, a Delaware corporation, and that under the powers given to him as the Executor of said estate under the will of W. A. Barker, deceased, he is authorized to exchange 18,327.30 shares of said Delaware corporation for 8,353.67 shares of the capital stock of this corporation, and that he, as such executor, would this day obtain an order of the Superior Court of the State of California in and for the County of Los Angeles in the matter of said Estate of William A. Barker, deceased, pending therein, No. 56704, approving and confirming the exchange of said stock.

Whereupon, upon motion duly made, seconded and unanimously carried, this meeting of the Board of Directors adjourned until 4 o'clock p.m., to meet at the office of this corporation without further call or notice.

JAS. A. GIBSON, JR.,
Secretary. [83]

Exhibit 8

Minutes of an Adjourned Meeting of the Board of
Directors of Lawrence Barker, Incorporated

Pursuant to resolution adopted at the special meeting of the Board of Directors of this corporation, held at 10 o'clock a.m. of this day, an adjourned special meeting of said Board was held at the office of said corporation, Room 1111 Merchants National Bank Building, in the City of Los Angeles, State of California, at 4 o'clock p.m.

There were present: Directors Richard L. North and Jas. A. Gibson, Jr.

Absent: Director H. F. Prince.

In the absence of the President, Richard L. North, Vice-President, presided, and Jas. A. Gibson, Jr., the Secretary of the company, acted as Secretary of the meeting.

The Vice-President stated that application had been made to the Commissioner of Corporations of the State of California, for his permit permitting this corporation to sell and issue at par, 19,997 shares of its capital stock to C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and F. K. Colby, Trustee, and that this day the permit of said Corporation Commissioner had been issued to this corporation permitting it to so issue 19,997 shares of its capital stock, such stock when issued to be deposited with a depository to be selected by this corporation and approved by the Commissioner of Corporations, to be held as an escrow pending the further order of

said Corporation Commissioner; that in accordance with the offer of said C. Lawrence Barker, Pauline Barker, C. L. Barker, Trustee, Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased and F. K. Colby, [84] Trustee, presented at the meeting of the Board of Directors of this corporation, held at 10 o'clock a.m. of this day, said C. Lawrence Barker is entitled to 4,504.13 shares; Pauline Barker is entitled to 4,062.24 shares; C. L. Barker, Trustee is entitled to 2,350.23 shares; Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, Deceased, is entitled to 8,353.67 shares and F. K. Colby, Trustee is entitled to 726.73 shares of said capital stock.

Whereupon, upon motion duly made, seconded and unanimously carried, S. M. Haskins, 1111 Merchants National Bank Building, Los Angeles, California, was designated by this corporation as the depositary selected by it to hold said stock, to be issued to said above named persons, in escrow.

There was then presented to the meeting a true copy of the order made by the Judge of the Superior Court of the County of Los Angeles, State of California, in the matter of the Estate of William A. Barker, deceased, in words and figures following:

“In the Superior Court of the State of California
in and for the County of Los Angeles

In the Matter of the Estate of

WILLIAM A. BARKER,

Deceased.

ORDER APPROVING AND CONFIRMING
EXCHANGE OF CERTAIN PERSONAL
PROPERTY OF SAID ESTATE

Upon reading and filing of the return and account made by Charles Lawrence Barker, Executor, of an exchange of certain personal property of the Estate of William A. Barker, deceased, under authority given by will, and it appearing to the Court that said exchange is for the best interests of said estate and for the beneficiaries thereof,

It Is Hereby Ordered that the exchange of 3,418.19 shares of Barker Bros. Inc., made by said Executor for 18,327.30 shares of the common stock of Barker Bros. Incorporated, a corporation created and organized under [85] the laws of the State of Delaware, and the exchange of said 18,327.30 shares of the common stock of Barker Bros. Incorporated, for 8,353.664 shares of the capital stock of Lawrence Barker, Incorporated, a corporation created and organized under the laws of the State of California, be and the same is hereby approved and confirmed.

Done in Open Court this 28th day of December,
1923.

FRANK R. WILLIS,

Judge of the Superior Court.”

Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved: That 43,870 shares of the common capital stock of Barker Bros. Incorporated, a Delaware corporation, having now been received by this corporation, the Vice-President and Secretary of this corporation be, and they are hereby authorized and directed to issue the following number of shares of the capital stock of this corporation to the persons hereinafter named, C. Lawrence Barker 4,504.13 shares; Pauline Barker 4,062.24 shares; C. L. Barker, Trustee 2,350.23 shares; Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased 8,353.67 shares and F. K. Colby, Trustee, 726.73 shares; and

Be It Further Resolved: That the Secretary of this corporation shall cause the certificates evidencing said stock to be deposited with S. M. Haskins, designated by this corporation as the depositary for said stock, pursuant to the said permit of the Corporation Commissioner of this date, and that the receipt of said S. M. Haskins as such depositary shall be filed with said Commissioner of Corporations, all in accordance with said [86] permit.

Thereupon, the Vice-President and Secretary of this corporation executed and issued temporary certificates to C. Lawrence Barker, for 4,504.13 shares; to Pauline Barker, 4,062.24 shares; to C. L. Barker, Trustee, 2,350.23 shares; to Chas. Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, 8,353.67 shares; and to F. K. Colby,

Trustee, 726.73 shares of the capital stock of this corporation, proper revenue stamps being affixed and cancelled.

Thereupon, upon motion duly made, seconded and unanimously carried, the President of this corporation was authorized and directed, for and on behalf of this corporation, to offer to exchange said 43,870 shares of the common capital stock of said Barker Bros. Incorporated, a Delaware corporation, for \$2,087,000. par value of the first preferred stock and \$2,300,000. par value of the second preferred stock of said corporation, said offer being in words and figures following, to-wit:

December 28th, 1923

Barker Bros. Incorporated,
A Delaware Corporation:

Gentlemen:

The undersigned, Lawrence Barker, Incorporated, a corporation formed and existing under the laws of the State of California, hereby offers to exchange \$4,387,000.00 par value of the common stock of your corporation now owned by the undersigned, for \$2,087,000.00 par value of the First Preferred Capital stock and \$2,300,000.00 of the Second Preferred capital stock of your company (Barker Bros. Incorporated.)

Upon acceptance of this offer at the place provided below, and upon the delivery by you of said preferred stock, the undersigned will deliver to you, or to your [87] order, endorsed for transfer, the

above common stock of your company now owned by it.

LAWRENCE BARKER,
INCORPORATED,
By H. F. PRINCE,
President.

The above offer is hereby accepted:

BARKER BROS.
INCORPORATED,

By,

Attest:

.....,
Secretary.

and upon motion duly made, seconded and unanimously carried, the President of this corporation was authorized and directed, upon the acceptance of said offer by said Barker Bros. Incorporated, a Delaware corporation, to deliver to said Delaware corporation the Certificate or Certificates owned by this corporation evidencing 43,870 shares of the common stock of said Delaware corporation in exchange for certificates of said corporation evidencing \$2,087,000.00 par value of its first preferred stock and \$2,300,000.00 par value of its second preferred stock.

Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved: That H. F. Prince, the President of this corporation, be, and he is hereby authorized, empowered and directed for and on behalf of this

corporation, to make all necessary offers in writing or otherwise, and to do all things necessary to accomplish the exchange by this corporation of 43,870 shares of the common capital stock of said Barker Bros. Incorporated, a Delaware corporation, for \$2,087,000.00 par value of the first preferred and \$2,300,000.00 par value of the second preferred stock of said corporation, and upon the completion of such [88] exchange, to at once notify this corporation thereof.

There being no further business to come before the meeting, it was, upon motion duly made, seconded and unanimously carried, adjourned.

JAS. A. GIBSON, JR.,
Secretary. [89]

Exhibit "9"

In the Corporation Department of the
State of California

In the Matter of the Application of
LAWRENCE BARKER, INCORPORATED, for
Permission to Sell and Issue Its Securities.

Supplemental Application

To the Hon. Edwin M. Daugherty, State Corporation Commissioner, 1006 Pacific Finance Building, Los Angeles, California.

Now Comes Lawrence Barker, Incorporated, and files this its application for a supplemental permit authorizing it to sell and issue 19,997 shares of its

capital stock and in support thereof respectfully represents:

I.

That applicant is a California corporation having an authorized capital stock of \$2,000,000., divided into 20,000 shares of the par value of \$100. each. That a permit has heretofore been issued authorizing applicant to sell and issue one share of its capital stock to each of its three incorporating directors, and with the application for said permit there was filed herein a certified copy of applicant's Articles of Incorporation and a true copy of its stock certificate, and that there is attached hereto, marked "Exhibit A" and made a part of this application, a true copy of applicant's by-laws.

II.

That applicant's office is located at No. 1111 Merchants National Bank Building in the City of Los Angeles, State of California; that it has neither assets nor liabilities and that the names and addresses of its officers are as follows, to wit:

H. F. Prince, President,

1111 Merchants National Bank Bldg.,
Los Angeles, California. [90]

Richard L. North, Vice-President,

1111 Merchants National Bank Bldg.,
Los Angeles, California.

James A. Gibson, Jr., Secretary,

1111 Merchants National Bank Bldg.,
Los Angeles, California.

III.

That there is attached hereto, marked "Exhibit B" and made a part of this application, a true statement as of November 30th, 1923, of the assets and liabilities of Barker Bros., Inc., a California corporation, by which statement the value of the common stock of said corporation appears to be and now is not less than \$335.99.

That Lawrence Barker, Lawrence Barker, Executor of the Estate of W. A. Barker, Deceased, Pauline Barker, C. L. Barker, Trustee, and F. K. Colby, Trustee, are the owners and holders of 8,183.69 shares of the common capital stock of said Barker Bros. Inc., and that they, with others, will transfer to Barker Bros., Incorporated, (a Delaware corporation, having an authorized capital stock of \$15,000,000., divided into 150,000 shares of the par value of \$100. each, of which 100,000 shares are common and 25,000 shares are first preferred and 25,000 are second preferred) 17,894.35 shares of the common capital stock of said Barker Bros. Inc., having an aggregate book value of \$6,012,318.63 in exchange for which said Delaware corporation will issue all of its common stock of the aggregate par value of \$10,000,000, giving a book value of \$60.12 to each share of the common stock of said Delaware corporation.

In payment for said 8183.69 shares of the common stock of said Barker Bros. Inc., transferred to said Delaware corporation, it will (at the direction and with the consent of said five (5) persons

above named) issue 43,870 shares of its common capital stock (having an aggregate book value of \$2,637,464.40) to applicant company. [91]

IV.

That thereafter and not before applicant desires and proposes (if permitted so to do) to sell and issue shares of its capital stock to said Lawrence Barker, Lawrence Barker, Executor of the Estate of W. A. Barker, deceased, and Pauline Barker, C. L. Barker, Trustee, and F. K. Colby, Trustee, but not exceeding in the aggregate to any or all of them 19,997 shares in payment and exchange for the 43,870 common shares of said Delaware corporation issued to applicant in payment for said 8183.69 common shares of said Barker Bros. Inc., transferred to said Delaware corporation by said five (5) persons.

That there is attached hereto, marked "Exhibit C" and made a part of this application, a true copy of a resolution of the Board of Directors of applicant company authorizing this application to be made and filed and the issuance of the securities as herein prayed for.

That upon the issuance of the shares of applicant company, as herein prayed for, applicant will issue its securities of the aggregate par value of approximately \$2,000,000. with assets on hand of a book value in excess of \$2,500,000.

Wherefore, applicant prays that a permit be issued authorizing it to sell and issue shares of its

capital stock to Lawrence Barker, Lawrence Barker,
Executor of the Estate hereinbefore recited.

Respectfully submitted,

LAWRENCE BARKER,
INCORPORATED,

By
Vice-President.

By
Secretary.

GIBSON, DUNN & CRUTCHER,
Attorneys for Applicant. [92]

State of California,
County of Los Angeles—ss.

James A. Gibson, Jr., being first duly sworn, de-
poses and says: that he is an officer, to wit: the
Secretary of Lawrence Barker, Incorporated, a
California corporation, applicant named in the fore-
going application; that he has read said application
and knows the contents thereof, and that the same
is true of his own knowledge.

.....

Subscribed and sworn to before me this 27th day
of December, 1923.

.....

Notary Public in and for the County of Los An-
geles, State of California. [93]

State Corporation Department of the
State of California

In the Matter of the Application of
LAWRENCE BARKER, INCORPORATED, for a
Certificate Authorizing It to Sell Its Securities.

SUPPLEMENTAL PERMIT

GIBSON, DUNN & CRUTCHER,
Attorney for Applicant.

The Issuance of This Certificate Is Permissive Only
and Does not Constitute a Recommendation or
Endorsement of Any Securities or Other Mat-
ters Herein Contained.

Lawrence Barker, Incorporated, a California cor-
poration, is permitted to sell and issue at par 19,997
shares of its capital stock to the persons and for the
considerations recited in its application.

The above permit is issued upon the following
condition:

(a) That, when issued, all certificates evidencing
any of the 19,997 shares authorized herein, in para-
graph, to be issued to the persons recited in
the application
shall be forthwith deposited with a depository, to
be selected by said permit [94] holder and approved
by the Commissioner of Corporations, to be held as
an escrow pending the further order of said Com-
missioner; that the receipt of such depository for
such certificates shall be filed with said Commis-
sioner of Corporations, and that while said certifi-

cates shall be so held, the holder of the shares evidenced thereby shall not sell, or offer for sale, or otherwise transfer, or agree to sell, or transfer such shares, until the written consent of said Commissioner shall have been obtained so to do.

Dated: Los Angeles, California, December 28, 1923.

[Seal]

EDWIN M. DAUGHERTY,
Commissioner of Corpora-
tions.

HRS:CR [95]

Exhibit 10

Barker Bros. Incorporated

Special Meeting of the Board of Directors

December 29, 1923

A special meeting of the Board of Directors of Barker Bros. Incorporated, was held on the 29th day of December, 1923, at 11:45 o'clock a.m., at 61 Broadway in the City of New York.

Present were Messrs. Warren B. Pinney, Harry E. Benedict and Garrett A. Brownback, being all of the Directors of the Corporation and therefore a quorum.

Mr. Warren B. Pinney, the President, called the meeting to order and presided. Mr. Henry F. Princee, the Secretary, acted as Secretary of the meeting and kept the minutes.

The Chairman presented a written Call and Waiver of Notice stating the objects and purposes of the meeting and signed by all of the Directors, pursuant to which the meeting was held and the

same was ordered filed with the minutes of the meeting.

On motion duly made and seconded, the minutes of the first meeting of the Board of Directors held on December 28, 1923, were duly approved.

The Chairman reported that pursuant to the action taken by the Board of Directors at the first meeting thereof, this Corporation had acquired the entire issued and outstanding Common Capital Stock of Barker Bros. Inc., a California corporation, by certificates therefor duly delivered to this Corporation, and that in exchange therefor certificates for \$9,569,700 par value of the Common Capital Stock of this Corporation had been issued.

The Chairman then presented written proposals from the holders of \$4,480,500 par value of the Common Capital Stock of this Corporation offering to exchange the same for \$2,087,000 par value [96] of the First Preferred Stock of this Corporation and \$2,393,500 par value of its Second Preferred Stock. He further reported that the holders of the remaining \$5,089,200 par value of the issued and outstanding Common Capital Stock of this Corporation were agreeable and had consented to such exchange; whereupon, after discussion and consideration, the following preambles and resolutions were presented:

Whereas, The holders of \$4,480,500 par value of the Common Capital Stock of this Corporation have offered to exchange the same for \$2,087,000 par value of the First Preferred Stock and \$2,393,500 par value of the Second Preferred Stock of this

Corporation, true and correct copies of which proposals are as follows:

December 29, 1923

Barker Bros. Incorporated
A Delaware Corporation:

Gentlemen:

The undersigned, Lawrence Barker, Incorporated, a corporation formed and existing under the laws of the State of California, hereby offers to exchange \$4,387,000.00 par value of the common stock of your corporation now owned by the undersigned, for \$2,087,000.00 par value of the First Preferred capital stock and \$2,300,000.00 of the Second Preferred Capital stock of your company (Barker Bros. Incorporated).

Upon the acceptance of this offer at the place provided below, and upon the delivery by you of said preferred stock, the undersigned will deliver to you, or to your order, endorsed [97] for transfer, the above common stock of your company now owned by it.

LAWRENCE BARKER,
INCORPORATED,

By HENRY F. PRINCE,

[Corporate Seal] President.

The above offer is hereby accepted:

BARKER BROS.
INCORPORATED,

By,

Attest:

.....,
Secretary.

December 29, 1923

Barker Bros. Incorporated
 A Delaware Corporation:
 Gentlemen:

We hereby offer to exchange 935 shares of the common stock of your company owned by us for 935 shares of Second Preferred capital stock of your corporation.

Upon acceptance of this offer at the place provided below, and upon delivery by you of said preferred stock, we will deliver to you or your order, endorsed for transfer, the above common stock of your company now owned by us.

You will please issue the stock of the undersigned to "J. W. Beam and Martha B. Beam, as joint tenants with the right of survivorship."

J. W. BEAM,
 MARTHA B. BEAM. [98]

The above offer is hereby accepted:

BARKER BROS.
 INCORPORATED,

By,

Attest:

.....,

Secretary.

and

Whereas, the holders of the remaining par value of the Common Capital Stock of this Corporation are agreeable to and have consented to such exchange, and, in the opinion of this Board, it is to

the interest of this Corporation that such exchange be made;

Now, Therefore, be it

Resolved, that the proposals hereinabove recited be and the same are hereby accepted upon the terms and conditions therein set forth, and that the President of this Corporation be and is hereby authorized and empowered, in its name for its account, to evidence such acceptance by noting on each of said proposals the acceptance thereof on behalf of this Corporation, and that the Secretary of this Corporation be and he is hereby authorized and directed to affix the seal of this Corporation to each such acceptance and thereupon duly attest the same; and be it

Further Resolved, that the proper officers of this Corporation be and they are hereby authorized, empowered and directed, in its name for its account, as and when the certificates duly endorsed in blank for transfer representing the \$4,480,500 par value of Common Capital Stock mentioned in said proposals are delivered to this Corporation in accordance with said proposals, to issue and deliver in exchange therefor, upon the basis and terms set forth in said respective proposals, to Lawrence Barker, Incorporated, certificates for \$2,087,000 par value of fully paid and nonassessable First Preferred Stock of this Corporation and for \$2,300,000 par value of its fully paid and non-assessable Second Preferred Stock, and to J. W. Beam and Martha B. Beam, as joint tenants, certificates [99]

for \$93,500 par value of its fully paid and non-assessable Second Preferred Stock; and be it

Further Resolved, that the \$2,087,000 par value of First Preferred Stock and \$2,393,500 par value of Second Preferred Stock of this Corporation, when certificates therefor shall be issued and delivered as hereinabove in these preambles and resolutions provided, shall be fully paid and non-assessable; and be it

Further Resolved, that the officers of this Corporation be and they are hereby authorized, empowered and directed in its name and for its account to take any and all such action, to make any and all such payments, and to execute, acknowledge and deliver all such instruments as may be necessary, proper or convenient in their judgment in order to carry out the intendment of these resolutions and the terms and provisions of said proposals.

A vote was thereupon taken for or against the adoption of the foregoing preambles and resolutions. Mr. Pinney and Mr. Benedict voted in favor of the adoption thereof. Mr. Brownback because of his unfamiliarity with the properties in question refrained from voting. The Chairman thereupon declared the foregoing preambles and resolutions duly adopted.

The question of conveying all of the assets of Barker Bros. Inc., the California corporation, to this Corporation, and its dissolution consequent thereon, was then discussed. Whereupon the following resolution was presented and its adoption duly moved and seconded:

Resolved, that the officers of this Corporation be and they are hereby authorized, empowered and directed, in its name and for its account, to take or cause to be taken, all and whatever action this Corporation may take as a stockholder of Barker Bros. Inc., a California corporation, to the end that the oustanding preferred stock [100] of said California corporation shall be called for redemption on the earliest date on which the same may be redeemed, or to otherwise retire said stock by purchase or otherwise; to provide the California corporation with all funds requisite for such redemption or retirement to the extent that the funds therefor may not be available in the treasury of said California Corporation as and when required for such purpose; to cause said corporation to convey and transfer to this Corporation all of its property and assets, business and good-will, including cash on hand and in bank, subject to and with provision for the assumption by this Corporation of all of the debts, liabilities and obligations of said California corporation whether arising in tort, ex-contractu or otherwise, including in the event of the call for redemption of said preferred stock the obligation of said California corporation to pay the redemption price to the respective holders of said preferred stock; and upon such conveyance and transfer, or thereafter whenever it shall be convenient, to cause proper proceedings to be taken by said California corporation to effect its dissolution in the manner provided by law; and that said officers be and they are hereby authorized and

empowered to take or cause to be taken any and all such other action to make or cause to be made any and all such other payments, and to execute, acknowledge and deliver or cause to be executed, acknowledged and delivered any and all such other instruments as may in their judgment be proper, convenient or necessary in order to carry out the intendment of [101] this resolution.

A vote was thereupon taken for or against the adoption of the foregoing resolution. Mr. Pinney and Mr. Benedict voted in favor of the adoption thereof. Mr. Brownback refrained from voting by reason of his unfamiliarity with the situation. The Chairman thereupon declared the foregoing resolution duly adopted.

No further business was presented and the meeting on motion adjourned.

HENRY F. PRINCE,
Secretary. [102]

Barker Bros. Incorporated
Special Meeting of Directors
Call and Waiver of Notice

We, the undersigned, being all of the Directors of Barker Bros. Incorporated, a corporation of the State of Delaware, do hereby call a special meeting of the Board of Directors thereof to be held on the 29th day of December, 1923, at 11:45 o'clock a.m. at 61 Broadway, New York City, for the purpose of considering and acting upon proposals for the issue of \$2,087,000 par value of First Preferred

Stock and \$2,393,500 par value of Second Preferred Stock of this Corporation in exchange for a like par value of the issued and outstanding Common Stock of this Corporation, and also for the purpose of authorizing the issue and sale of the remaining \$413,000 par value of First Preferred Stock of this Corporation, and for the transaction of any and all such other business as may come before the meeting in connection with the foregoing; of which meeting we hereby waive all requirements of notice of the time, place and objects thereof.

WARREN B. PINNEY,
HARRY E. BENEDICT,
GARRETT A. BROWNBACK.

Exhibit 11

Minutes of a Special Meeting of the Board of Directors of Lawrence Barker, Incorporated

The Board of Directors of Lawrence Barker, Incorporated, met at Room 1111 Merchants National Bank Building, in the City of Los Angeles, State of California, on the 29th day of December, 1923, at the hour of 10 o'clock A.M., pursuant to the following waiver of notice and consent signed by all of the Directors of said corporation, to wit:

Waiver of Notice and Consent

The undersigned directors of Lawrence Barker, Incorporated, do hereby consent to the holding of a meeting of the Board of Directors of said Corporation, at Room 1111, Merchants National Bank Build-

ing, in the City of Los Angeles, California, on the 29th day of December, 1923, at the hour of 10 o'clock A.M., for the purpose of considering and acting upon any and all business which may be brought before said meeting, and we do hereby waive any and all notice of such meeting.

Dated: December 29, 1923.

H. F. PRINCE,

JAS. A. GIBSON, JR.

Present: Directors Richard L. North and Jas. A. Gibson, Jr.

Absent: Director H. F. Prince.

In the absence of the President, Richard L. North, Vice-President, presided and Jas. A. Gibson, Jr., Secretary of the company, acted as Secretary. [104]

The Vice-President stated that there had been issued to this corporation in temporary form, certificates evidencing \$2,087,000.00 par value of the first preferred stock and \$2,300,000.00 par value of the second preferred stock of Barker Bros. Incorporated, a Delaware corporation; that Lawrence Barker of Los Angeles, California, had presented to the corporation his offer in writing to purchase of this corporation \$1,087,000.00 par value of the first preferred stock of said Barker Bros. Incorporated at the sum or price of \$1,000,040., and to secure the payment thereof to give to this corporation his promissory note for the said sum of \$1,000,040. payable on or before ninety (90) days from date, with interest at seven per cent per annum said note to be secured by said \$1,087,000. par value of said

preferred stock. There was also presented to the meeting a certain agreement between said C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker and Marshall Field, Glore, Ward & Company, Investment Bankers of New York and Chicago, under which, among other things, said C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker agreed to cause this corporation to be formed and organized for the purpose, among other things, to acquire and hold \$2,087,000. par value of the first preferred stock and \$2,300,000. par value of the second preferred stock of said Barker Bros. Incorporated, a Delaware corporation, and said Marshall Field, Glore, Ward & Company covenanted and agreed, under the terms of said agreement, to purchase of this corporation \$1,087,000. par value of first preferred stock of said Barker Bros. Incorporated, of Delaware, at the price therein stated, and to net this corporation, after deducting the agreed discount, \$1,000,040. in cash. [105]

It was further stated that said Lawrence Barker now offers to assume the obligation of this company to so sell and deliver \$1,087,000. par value of the first preferred stock of said Barker Bros. Incorporated, of Delaware, and that said Marshall Field, Glore, Ward & Company have consented thereto, said offer of said Lawrence Barker to this corporation being in words and figures following:

Los Angeles, California

December 29, 1923

Lawrence Barker, Incorporated,
Los Angeles, California.

Gentlemen:

I hereby offer to purchase of you \$1,087,000. par value of the first preferred capital stock of Barker Bros. Incorporated, a Delaware corporation, owned by you, for the sum or price of \$1,000,040., and in payment of same to deliver to you, upon the delivery to me of said stock, my promissory note for the sum of \$1,000,040., payable on or before ninety days from date, with interest at the rate of seven per cent per annum and to pledge with you as security for the payment of said note, said \$1,087,000. par value of said first preferred stock of Barker Bros. Incorporated.

If this offer is accepted by you, and upon delivery to me of said first preferred stock in the above amount, I will also agree to assume any obligation that this company may have under a certain agreement dated December 20th, 1923, between C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker and Marshall Field, Glore, Ward & Company to sell to said last named company \$1,087,000. par value [106] of first preferred stock of said Barker Bros. Incorporated, of Delaware, at 92, plus accrued dividends.

Please advise me at once if this offer is acceptable to you.

Yours very truly,

LAWRENCE BARKER.

Thereupon, there was read to the meeting said agreement of December 20th, 1923, between C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker, and said Marshall Field, Glore, Ward & Company, and same was, upon motion duly made, seconded and unanimously carried, approved and ordered filed with the Secretary.

Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved: That this corporation does hereby ratify, confirm and approve the action of C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker in entering into said agreement of December 20th, 1923, with said Marshall Field, Glore, Ward and Company, and this corporation does hereby accept the offer of said Marshall Field, Glore, Ward & Company therein made to purchase of this company \$1,087,000. par value of the first preferred stock of said Barker Bros. Incorporated, of Delaware, now owned by this corporation, at 92 and accrued dividends, under the terms and conditions stated in said agreement; and

Be It Further Resolved: That it appearing to be for the best interests of this corporation, Marshall Field, Glore, Ward & Company consenting thereto, said offer of Lawrence Barker this day made to this corporation to purchase \$1,087,000. par value of the first preferred stock of said Barker Bros. Incorporated, of Delaware, for the sum or price of \$1,000,040. and to deliver in payment therefor to this corporation his promissory note payable on or [107] before ninety days from date, with interest

at the rate of seven per cent per annum, said note to be secured by said \$1,087,000. par value of said first preferred stock, be and the same is hereby accepted, and the President or Vice-President or Secretary of this corporation, or either of them, are hereby authorized and directed to deliver to said Lawrence Barker, or to his order, said \$1,087,000. par value of said preferred stock of said Barker Bros. Incorporated, of Delaware, upon delivery to this corporation of the promissory note of said Lawrence Barker, in the usual collateral form, said note to be for the sum and to bear interest and payable as hereinabove provided; provided, however, that the delivery to said Lawrence Barker of said \$1,087,000. par value of said preferred stock of said Barker Bros. Incorporated, of Delaware, shall be dependent upon said Lawrence Barker assuming any obligation that this corporation may have under said agreement dated December 20, 1923, between said C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker, and Marshall Field, Glore Ward & Company, to sell to said last named company \$1,087,000. par value of the first preferred stock of said Barker Bros. Incorporated, of Delaware, at 92, plus accrued dividends.

Whereupon, Mr. F. K. Colby was invited to attend the meeting and announced that he was authorized by C. Lawrence Barker to deliver, and he thereupon delivered to the Secretary of this corporation the promissory note of Lawrence Barker in words and figures following, to wit:

Los Angeles, California

\$1,000,040.00

December 29, 1923

On or before ninety (90) days after date, for value received, I promise to pay to Lawrence Barker, Incorporated, or order, at its office, in the City of Los [108] Angeles, California, One Million Forty and 00/100 Dollars, with interest from date at the rate of seven (7) per cent per annum until paid, and attorney's fees of ten per cent on the amount then unpaid if placed in the hands of an attorney for collection, or if suit be commenced or other proceedings be taken to enforce the payment of this note, or to sell any of the collateral securing same. Principal and interest payable in gold coin of the United States of America of the present standard. The makers, sureties, guarantors and endorsers of this note hereby consent to extensions of time at or after the maturity hereof, and hereby waive diligence, protest and demand and notice of every kind.

Lawrence Barker does hereby pledge to and deposit with Lawrence Barker, Incorporated, as collateral security for the payment of this note and of all of the obligations herein contained ten thousand eight hundred seventy (10,870) shares of first preferred stock of Barker Bros. Incorporated, evidenced by Certificate No. 12.

LAWRENCE BARKER.

(Revenue Stamps in amount of \$200.02 attached and cancelled.)

Mr. Colby thereupon delivered to the Secretary a communication from C. Lawrence Barker in words and figures following:

Los Angeles, California

December 29, 1923.

Lawrence Barker, Incorporated,
Los Angeles, California.

Gentlemen:

I hand you herewith my promissory note in favor of your company in the sum of \$1,000,040., in accordance with my written offer of this date, and in payment of \$1,087,000. par value of the first preferred stock of Barker Bros. Incorporated, a Delaware corporation. In consideration of the delivery to me of said stock, receipt whereof I hereby acknowledge, I agree to and do hereby assume any obligation that your company may have under a certain agreement dated December 20th, 1923, between C. H. Barker, Clarence A. Barker, Erle P. Barker and C. Lawrence Barker and Marshall Field, Glore, Ward & Company to sell said last named company \$1,087,000 par value of first preferred stock of said Barker Bros. Incorporated, of Delaware, at 92, plus accrued dividends.

Yours very truly,

LAWRENCE BARKER.

'There being no further business to come before the meeting, it was, upon motion duly made, seconded and unanimously carried, adjourned.

JAS. A. GIBSON, JR.

Secretary. [110]

Exhibit 12

Barker Bros. Incorporated
Special Meeting of the Board of Directors

A special meeting of the Board of Directors was held at 61 Broadway, New York, N. Y., on the 3rd day of January, 1924, at 11 o'clock A.M.

There were present: Messrs. Warren B. Pinney and Harry E. Benedict, being a majority of the Board of Directors and therefore a quorum.

Mr. Pinney, the President, called the meeting to order and presided. Mr. Henry F. Prince, the Secretary, acted as Secretary of the meeting and kept the minutes.

The Secretary presented a Waiver of Notice signed by all the Directors, which was ordered filed with the minutes of the meeting.

The President stated that the meeting was called for the purpose of considering the advisability of changing the Common Stock from shares of the par value of One Hundred Dollars (\$100) each to shares without par value, and by making provision for the issue of such Common Stock without par value in exchange pro rata, for the outstanding shares having a par value of One Hundred Dollars (\$100) per share.

After a full discussion, upon motion, duly made, seconded and carried, it was unanimously

Resolved that the certificate of incorporation of said Barker Bros. Incorporated be amended by striking out all of the first paragraph of the article

thereof numbered "Fourth" and by inserting in lieu thereof the following:

Fourth: The total authorized capital stock of this corporation is Five Million Dollars (\$5,000,000) of [111] Preferred stock divided into:

Twenty-five thousand (25,000) shares of par value of One Hundred Dollars (\$100.00) each of First Preferred Stock;

Twenty-five thousand (25,000) shares of par value of One Hundred Dollars (\$100.00) each of Second Preferred Stock; and

One hundred thousand (100,000) shares of common stock without nominal or par value.

Said one hundred thousand (100,000) shares of common stock without nominal or par value shall be issued by the corporation in exchange, pro rata, for the outstanding common stock of the corporation of the par value of One Hundred Dollars (\$100) per share of which \$5,089,200 in aggregate par value only is issued and outstanding.

that said amendment is advisable and a special meeting of the stockholders of this Corporation is hereby called to be held at 61 Broadway, New York, N. Y., on the 3rd day of January, 1924, at 2 o'clock in the afternoon to take action upon the foregoing resolution; and be it

Further Resolved that the proper officers of this corporation, if the stockholders approve, be and hereby are authorized to file the necessary certificate with the Secretary of State of Delaware to

effect the change in the Certificate of Incorporation; and be it

Further Resolved, that in the event of such approval the proper officers of this Corporation be and they are hereby authorized, empowered and directed to issue certificates for the entire one hundred thousand (100,000) shares of Common Stock without nominal or par value, [112] provided for in said proposed amendment in exchange, pro rata, and upon the surrender and cancellation of, the certificates for the outstanding Common Stock of the corporation having a par value of One Hundred Dollars (\$100) per share, as authorized in and by said proposed amendment.

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

Whereas there is still remaining in the Treasury of this corporation, unissued, \$413,000.00 par value of First Preferred Stock of this corporation,

And Whereas it is deemed advisable for the best interests of this corporation to sell and dispose of all of said First Preferred Stock,

And Whereas Marshall Field, Glore, Ward & Co., Bankers, have heretofore agreed to purchase all of said stock at 92% of the par value thereof,

Now Therefore, Be It Resolved: That the proper officers of this corporation be, and they have hereby, authorized, empowered and directed, in its name and for its account, to sell, issue and deliver unto Marshall Field, Glore, Ward & Co., of New York and Chicago, or order, all of the unissued First

Preferred capital stock of this corporation, not exceeding the total sum of \$413,000.00 par value, upon the payment to this corporation, or its order, of \$379,960.00, being 92% of the par value of said stock.

Be It Further Resolved: That the proper officers of this corporation be, and they are hereby, authorized, empowered and directed, in its name and for its account, to take any and all such action, and/or to execute, acknowledge and deliver all such instruments as may be necessary, proper or convenient in their judgment in order to carry out the [113] intent of this resolution.

The Chairman then presented the written resignation of Mr. Brownback as a Director of this Corporation to take effect upon the pleasure of this Board of Directors; whereupon, upon motion duly made and seconded, and by the affirmative vote of all the Directors, the following resolution was duly adopted:

Resolved: That the resignation of Mr. Brownback as a Director of this Corporation be and the same is hereby accepted; and that Mr. Elvon Musick be and he is hereby elected to fill the vacancy thus created, and to serve until the election and qualification of his successor.

The Secretary was directed to file Mr. Brownback's resignation with the minutes of the meeting.

The Chairman then called the attention of the Board to Article XII of the By-Laws of the Corporation authorizing the Board of Directors to increase the number thereof from three to nine and

to elect the additional Directors, the same to serve until the election and qualification of their respective successors. Whereupon, the following resolutions were upon motion duly made and seconded, and by the affirmative vote of all the Directors present, duly adopted:

Resolved: That in exercise of the power conferred by Article XII of the By-Laws of this Corporation upon this Board of Directors, the number of Directors thereof be and the same is hereby increased from three to nine; and be it

Further Resolved: That the following persons be and they are hereby elected Directors of this Corporation to serve until the election and qualification of their respective successors: H. S. McKee, C. H. Barker, C. A. Barker, C. Lawrence Barker, Erle P. Barker and F. K. Colby.

No further business was presented and the meeting on motion adjourned.

HENRY F. PRINCE,
Secretary. [114]

Exhibit 13

Minutes of a Special Meeting of the Board of Directors of Lawrence Barker, Incorporated

The Board of Directors of Lawrence Barker, Incorporated, met at Room 1111, Merchants National Bank Building, in the City of Los Angeles, State of California, on the 10th day of February, 1924, at the hour of 11 o'clock A.M., pursuant to the following

waiver of notice and consent signed by all of the Directors of said corporation, to wit:

Waiver of Notice and Consent

The undersigned Directors of Lawrence Barker, Incorporated, do hereby consent to the holding of a special meeting of the Board of Directors of said corporation at Room 1111, Merchants National Bank Building, in the City of Los Angeles, California, on the 10th day of February, 1924, at the hour of 11 o'clock A.M., for the purpose of considering and acting upon any and all business which may be brought before said meeting, and we do hereby waive any and all notice of such meeting.

Dated February 10, 1924.

PAULINE BARKER,

LAWRENCE BARKER,

F. K. COLBY.

Present: Directors Lawrence Barker and F. K. Colby.

Absent: Pauline Barker.

The meeting was called to order by the President, Lawrence Barker, who presided, and F. K. Colby, Secretary of the [115] Company, acted as Secretary.

The President stated that notification had been received from Marshall Field, Glore, Ward & Company that on the 11th day of February, 1924, said company desired to exercise its option to purchase of this corporation 2500 shares of the first preferred capital stock of Barker Bros. Incorporated, a Dela-

ware corporation, at 92 per cent of the par value thereof, plus accrued dividends to said February 11, 1924, and that proper arrangements had been made with Security Trust & Savings Bank for the payment through that bank to this corporation of the said purchase price for said stock. The President further stated that the foregoing is all in accordance with the option heretofore granted by this corporation to said Marshall Field, Glore, Ward & Company, and he therefore recommended that the transaction be completed and the stock delivered to said bank for delivery to said Marshall Field, Glore, Ward & Company upon the payment of said agreed purchase price.

The President further stated that an agreement had been made whereby this corporation was to exchange an additional 4130 shares of said first preferred stock of Barker Bros., Incorporated, for a like number of shares of said first preferred stock upon payment to this corporation of a sum in cash equal to dividends accrued on 4130 shares of said first preferred stock at the rate of $7\frac{1}{2}$ per cent per annum from January 1, 1924, to the date such exchange is effected.

Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved: That this corporation hereby sell and transfer to Marshall Field, Glore, Ward & Company 2500 shares of the first preferred capital stock of Barker Bros., Incorporated, a Delaware corporation, at the price of 92 per cent of the par value

thereof plus accrued [116] dividends to February 11, 1924, and upon payment to this corporation in addition of a sum equal to 8 per cent of the par value of said stock; and

Be It Further Resolved: That this corporation further exchange an additional 4130 shares of said first preferred capital stock of Barker Bros., Incorporated, a Delaware corporation, for a like number of shares of said preferred stock and the payment to this corporation of a sum in cash equal to dividends accrued on 4130 shares of said first preferred capital stock at the rate of $7\frac{1}{2}$ per cent per annum from January 1, 1924, to the date such exchange is effected; and

Be It Further Resolved: That the President and/or Secretary of this corporation be and they are hereby authorized, empowered and directed, in behalf of this corporation, to assign, transfer and deliver said first preferred capital stock to Marshall Field, Glore, Ward & Company, or to its order, upon payment to this corporation of the above-recited consideration, and to sign all papers and do all things necessary on behalf of this corporation to accomplish the purposes of the foregoing resolutions.

The Secretary of the corporation thereupon stated that the President of this corporation desires to pay in full the promissory note heretofore given by him in favor of this corporation, under date of December 29, 1923, for the principal sum of \$1,040,000.00,

a copy of said note being set forth at length upon page 33 of this Minute Book.

Whereupon, upon motion duly made, seconded and unanimously carried, it was [117]

Resolved: That upon payment to this corporation by Lawrence Barker of the sum of \$1,040,000.00, together with interest thereon at the rate of seven per cent per annum from December 29, 1923, this corporation cancel and deliver to said Lawrence Barker said promissory note for the said principal sum, heretofore made and delivered to this corporation, dated December 29, 1923.

The President stated that the corporation had engaged offices at No. 1116 I. N. Van Nuys Building, at the southwest corner of Seventh and Spring Streets, Los Angeles, California, and that it is deemed to be for the best interests of the corporation to move the business office of this corporation from 1111 Merchants National Bank Building to said I. N. Van Nuys Building.

Thereupon, upon motion duly made, seconded and unanimously carried, it was

Resolved: That from and after the date of this meeting, and unless and until otherwise ordered by the Board of Directors, the office of this corporation shall be at No. 1116 I. N. Van Nuys Building, at the southwest corner of Seventh and Springs Streets, in the City of Los Angeles, State of California.

There being no further business to come before

the meeting, it was, upon motion duly made, seconded and unanimously carried, adjourned.

F. K. COLBY,
Secretary.

February 20-24

No quorum on the above date.

F. K. COLBY,
Secty. [118]

Exhibit 14

Minutes of Meeting of Board of Directors of Lawrence Barker Incorporated

February 27, 1924.

Meeting of the Board of Directors of Lawrence Barker Incorporated, the 27th day of February, at the office of the corporation, 1116 Van Nuys Building, at the hour of 11:00 a.m., pursuant to waiver of notice and consent signed by all of the Directors of said corporation.

Directors present being Lawrence Barker and F. K. Colby, absent, Pauline Barker, meeting was called to order by the President, Lawrence Barker, who presided, and F. K. Colby, Secretary of the company acted as Secretary. The President stated that notification had been received from Marshall Field, Glore, Ward & Co. that on the 28th day of February, 1924, said company desired to exercise its option to purchase from this corporation twenty-five hundred (2500) shares of the First Preferred Capital stock of Barker Bros. Incorporated, price for said shares of capital stock being at par plus

accrued dividends to date of sale, and that said Marshall Field, Glore, Ward & Co. had made arrangements with the Security Trust and Savings Bank for the payment of 92% of the par value thereof of said stock plus accrued dividends to date of sale and had made arrangements with Barker Bros. Incorporated for the payment of the remaining 8% of the par value thereof of said stock.

The President also stated that the foregoing is all in accordance with the option heretofore granted to said Marshall Field, Glore, Ward & Co., and he therefore recommended that the transaction be completed and the stock delivered to said bank, namely, Security Trust & Savings Bank of Los Angeles, California, for delivery to said Marshall Field, Glore, Ward & Co., upon payment of said agreed purchase price, and in the manner as stated. Thereupon, upon motion duly made and unanimously carried, be it resolved that this corporation hereby sells and transfers to Marshall Field, Glore, Ward & Co., twenty-five hundred shares (2500) of the First Preferred Capital Stock of Barker Bros., Incorporated, plus accrued dividends to February 28th; and it was further resolved that the President and/or Secretary of this corporation be, and they are hereby authorized, empowered and directed, in behalf of this corporation to assign, transfer and deliver said Preferred Capital Stock to Marshall Field, Glore, Ward & Co., or to its order and to sign all papers and do all things necessary on behalf of this corporation to accomplish the purpose of the foregoing resolution.

The President then called to the attention of the Board that an error had been made in the first and last paragraph of resolution pertaining to the sale of Barker Bros. Incorporated capital stock to Marshall Field, Glore, Ward & Co. Upon motion duly made and unanimously carried, it was resolved that the first and last paragraph of resolution of February 10th on pages 43 and 44, of the minute book of this corporation, be amended to read as follows: "Now, Therefore, be it

Resolved that this corporation hereby sells, and transfers to Marshall Field, Glore, Ward & Co., twenty-five hundred shares (2500) of the First Preferred Capital Stock of Barker Bros. Incorporated, plus accrued dividends to February 11th; and it was further

Resolved that the President and/or Secretary of this corporation be, and they are hereby authorized, empowered and directed, in behalf of this corporation to assign, transfer and deliver said Preferred Capital Stock to Marshall Field, Glore, Ward & Co., or to its order and to sign all papers and do all things necessary on behalf of this corporation to accomplish the purpose of the foregoing resolution."

There being no further business to come before the meeting, it was, upon motion duly made, seconded and carried, adjourned.

F. K. COLBY,
Secretary.

Lawrence Barker, Incorporated Meeting of
Directors Call and Waiver of Notice

We, the undersigned, being all of the Directors of Lawrence Barker, Incorporated, a corporation of the State of California, do hereby call a Special Meeting of the Board of Directors thereof to be held on the 27th day of February, 1924, at 11:00 o'clock a.m. at the office of the corporation for the purpose of authorizing sale of twenty-five hundred (2500) shares of the First Preferred Capital Stock of Barker Brothers, Incorporated, to Marshall Field, Glore, Ward & Company, of Chicago, Illinois, and for the transaction of any and all such other business as may come before the meeting in connection with the foregoing; of which meeting we hereby waive all requirements of notice of the time, place and objects thereof.

/s/ LAWRENCE BARKER,
/s/ PAULINE BARKER,
/s/ F. K. COLBY.

Exhibit 15

Lawrence Barker, Inc.

Earned Surplus Per Books

December

31

1923	_____
1924	\$ 68,404.29
1925	214,744.01
1926	298,393.60
1927	409,592.99
1928	107,675.72
1929	237,876.03

1930	.....	49,148.83
1931	.....	48,219.89
1932	.....	95,375.92
1933	.....	73,696.04
1934	.....	24,968.36
1935	.....	52,201.83
1936	.....	38,720.06
1937	.....	82,066.12
1938	.....	63,472.45
1939	.....	60,397.81
1940	.....	115,888.57
1941	.....	185,796.91
1942	.....	214,896.63
1943	.....	264,380.50

[*Figures opposite years, 1935 to 1943, inclusive, appear in red on original.] [123]

Exhibit 16

Lawrence Barker, Inc.

Schedule of Stock Issued and Transferred

Ctf. No.	No. of Shares	Name of Stockholder	Cancelled & Replaced by Ctf. No.	Date of Issuance
1 Temp.	1	H. F. Prince	1	12/26/23
2 Temp.	1	Richard L. North	2	12/26/23
3 Temp.	1	Jas. A. Gibson, Jr.	3	12/26/23
4 Temp.	4504.13	C. Lawrence Barker	4	12/26/23
5 Temp.	4062.24	Pauline Barker	5	12/26/23
6 Temp.	2350.23	C. L. Barker, Trustee	6	12/26/23
7 Temp.	8353.66	Chas. Lawrence Barker, Exeutor	7	12/26/23
8 Temp.	726.73	F. K. Colby, Trustee	8	12/26/23
1	1	H. F. Prince	9	1/28/24
2	1	Richard L. North	10	1/28/24
3	1	Jas. A. Gibson, Jr.	11	1/28/24
4	4304.13	C. Lawrence Barker	15,16,17,18	1/28/24
5	4062.24	Pauline Barker	12,13,14	1/28/24

Ctf. No.	No. of Shares	Name of Stockholder	Cancelled & Replaced by Ctf. No.	Date of Issuance
6	2350.23	C. L. Barker, Trustee	27	1/28/24
7	8353.69	Chas. Lawrence Barker, Executor	22,23	1/28/24
8	726.73	F. K. Colby, Trustee	31	1/28/24
9	1	Lawrence Barker		1/28/24
10	1	Pauline Barker	42	1/28/24
11	1	F. K. Colby	29	1/28/24
12	114	Frank Berman	38	1/30/25
13	114	Harry Berman	35	1/30/25
14	3834.24	Pauline Barker	19,20,21	1/30/25
15	67.09	F. K. Colby, Trustee	32	6/30/25
16	67.09	F. K. Colby, Trustee	34	6/30/25
17	67.09	F. K. Colby, Trustee	33	6/30/25
18	4302.86	C. Lawrence Barker		6/30/25
19	110	Harry Berman	37	1/20/26
20	110	Frank Berman	39	1/20/26
21	3614.24	Pauline Barker	42	1/20/26
22	4176.84	Pauline Barker	24,25,26	6/ 8/26
23	4176.83	C. Lawrence Barker	44,45	6/ 8/26
24	224	Harry Berman	36	3/11/27
25	224	Frank Berman	40	3/11/27
26	3728.84	Pauline B. Barker	42	3/11/27
27	2350.23	Frank K. Colby, Trustee	30	2/23/31
28	---	Cancelled—Not Issued	---	---
29	1	Philip R. Johnson		12/12/34
30	2350.23	Lawrence Barker, Trustee	46,47,48	1/ 4/35
31	726.73	Horace Wilson, Trustee	41	1/ 4/35
32	67.09	Horace Wilson, Trustee	41	1/ 4/35
33	67.09	Horace Wilson, Trustee	41	1/ 4/35
34	67.09	Horace Wilson, Trustee	41	1/ 4/35
35	114	Pauline Barker	42	6/10/36
36	224	Pauline Barker	42	6/10/36
37	110	Pauline B. Barker	42	6/10/36
38	114	Pauline B. Barker	42	7/30/37
39	110	Pauline B. Barker	42	7/30/37
40	224	Pauline B. Barker	42	7/30/37
41	928	Horace S. Wilson & Philip R. Johnson, Trustees	46,47,48	10/15/37

Ctf. No.	No. of Shares	Name of Stockholder	Cancelled & Replaced by Ctf. No.	Date of Issuance
42	8240.08	Lawrence Barker, Sr., and Pauline B. Barker as Trus- tees by virtue of trust in- denture dated January 19, 1942, designating Pauline B. Barker as Trustor and Lawrence Barker, Sr., as trustee.	43	5/ 2/42
43	8240.08	Pauline B. Barker	49,50	11/12/42
44	31	Lawrence Barker	Retired in Liquidation	12/30/42
45	4145.83	Lawrence Barker	51,52	12/30/42
46	1092.75	Elizabeth Barker Forbes Derby		3/30/43
47	1092.74	William A. Barker, II.		3/30/43
48	1092.74	Lawrence Barker, Jr.		3/30/43
49	8210.08	Pauline B. Barker		12/28/43
50	30	Pauline B. Barker	Retired in Liquidation	12/28/43
51	4115.83	Lawrence Barker		12/28/43
52	30	Lawrence Barker	Retired in Liquidation	12/28/43

[Endorsed]: Filed November 14, 1949.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR CORREC- TION OF STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between counsel for the plaintiff and defendant that subject to the approval of the Court the Stipulation of Facts filed in the above-entitled consolidated actions on November 14, 1949, may be changed and corrected as follows:

(1) Commencing with the words "in exchange" at the end of line 6 on page 17 of said Stipulation, delete the words, "in exchange for the transfer by

the Lawrence Barker interests to L. B. Inc. of 8179.69 shares of common stock of Barkers, California, all''

The defendant does not desire to stipulate the legal effect of the various transfers mentioned in the preceding parts of said Stipulation of Facts.

It is agreed that the foregoing change to the Stipulation of Facts is in no way to be deemed an admission by the plaintiffs that the language deleted is not true.

Dated: This 13th day of January, 1950.

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE, and
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Defendant.

IRELL & MANELLA,

By /s/ ARTHUR MANELLA,
Attorneys for Plaintiffs.

It Is So Ordered This 17th day of January, 1950.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed January 18, 1950.

In the District Court of the United States Southern
District of California, Central Division
No. 9621-BH

LAWRENCE BARKER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 9620-BH

MRS. W. A. BARKER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant,

MEMORANDUM OPINION

In the above-entitled consolidated actions, plaintiffs each seek recovery of overpayment of income taxes for the year 1943. These actions arise over the sale by each of 30 shares of the common stock of Lawrence Barker, Inc.

The amounts involved do not justify the expense and work devoted to these two cases, unless it is a test case to establish a rule and guide in the disposition of future sales of the same stock.

An over-simplification of the facts reveals that the Lawrence Barker interests held certain stock in Barker Bros. of California, the California corpora-

tion reorganized under the laws of Delaware. Instead of the Lawrence Barker Interests having the Delaware corporation deliver to them their proportionate shares, they caused them to be delivered to Lawrence Barker, Inc. The formation of Lawrence Barker, Inc. was for the specific purpose of holding said stock. I look upon the transaction as a simple transfer of stocks in Barker Bros. of Delaware to a holding company for the Lawrence Barker Interests. While the stock of Barker Bros. of Delaware was never directly delivered to the original owners personally, it was on their direction delivered to Lawrence Barker, Inc.

Plaintiff states the question involved is whether the 1923 transactions, whereby the Lawrence Barker Interests received Lawrence Barker, Inc. stock, was a taxable transaction. If it was a taxable transaction plaintiffs are entitled to prevail.

If I look to substance rather than form, Lawrence Barker, Inc. acquired stock belonging to Lawrence Barker Interests as a holding corporation for the various parties grouped into the Lawrence Barker Interests. The corporate entity was in substance and in fact the same as the Lawrence Barker Interests.

I agree with counsel for defendant when they quote Mr. Justice Frankfurter saying: "A given result at the end of a straight path," this court said in *Minnesota Tea v. Helvering*, 302 U.S. 609, 613, "is not made a different result because reached by following a devious path." (*Griffith v. Commissioner*, 308 U. S. 355).

While counsel both give lip service to the above quotation, they proceed through lengthy and wordy briefs citing authorities galore, to discuss the form rather than the substance of the case. Studying the authorities cited one appreciates the statement in Mertens, Vol. 3, p. 331, where the author said: "As stated before, reconciliation of the decided cases is impossible and a recital of the pros and cons would bring the exhausted reader back to where he and the author started." To me it was like going through a terrible nightmare.

My conclusions are based upon the substance of the transactions. I cannot see where any tax liability was created by the Lawrence Barker Interests by transferring their interests in Barker Bros. of Delaware to Lawrence Barker, Inc.

Defendant is entitled to a judgment. It is my understanding the amounts involved will be stipulated by the parties. Counsel for defendant is directed to prepare the proposed findings and judgment.

Dated: This 24th day of May, 1950.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

No. 9621-BH

OBJECTIONS TO DEFENDANT'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Comes now the plaintiff above named, and objects to the above named defendant's proposed Findings of Fact and Conclusions of Law, upon the following grounds:

1. All of the pertinent facts in the above-entitled case were stipulated to by and between plaintiff and defendant in a "Stipulation of Facts" filed with this Court.

2. Defendant's proposed Findings of Fact are incomplete in that they omit entirely, and fail to find as facts, all of the facts stipulated by and between the parties and agreed to by and between plaintiff and defendant to be material and relevant herein, as set forth in paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the aforementioned Stipulation of Facts.

3. Defendant's proposed Findings of Fact are incomplete in that they omit entirely, and fail to find as facts, all of the facts stipulated by and between the parties, although objected to by defendant during the course of trial as immaterial, as set forth in paragraphs IV, XVI, XVII, XVIII, XIX (lines 7 to 9 on page 10), XX, XXI, XXII, XXIII, XXIV, XXV, XXVI and XXVII of the aforementioned Stipulation of Facts.

4. Defendant's proposed Findings of Fact are incomplete in that they omit entirely, and fail to find as a fact, that on March 15, 1944, plaintiff filed his federal income tax return for the calendar year 1943, with the Collector of Internal Revenue for the Sixth District of California, and paid to such Collector, shown on plaintiff's return; that plaintiff included on or before March 15, 1944, the entire tax liability in his 1943 return, as income from capital gain, the entire amount of \$5,000.00 received by him as the sales price of his 30 shares of the common stock of Lawrence Barker, Incorporated, referred to in defendant's proposed Finding No. VIII (see allegation in plaintiff's Complaint, paragraph 7, admitted by defendant).

Dated: September 5, 1950.

IRELL & MANELLA,

By /s/ ARTHUR MANELLA,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 4, 1950.

[Title of District Court and Cause.]

No. 9621-BH

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial before the Court sitting without a jury at Los Angeles, California, on the 14th day of November, 1949, the Honorable Ben Harrison, Judge, presiding; the

plaintiff appeared by Lawrence Irell and Arthur Manella, his attorneys: the defendant appeared by Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, its attorneys; evidence consisting of a written Stipulation of Facts was introduced and briefs thereafter submitted on behalf of the respective parties; the Court having considered the evidence, the briefs submitted and heretofore formulated its opinion now makes the following:

Findings of Fact

I.

Lawrence Barker, one of the plaintiffs herein, and Charles Lawrence Barker, C. Lawrence Barker and C. L. Barker are one and the same person.

II.

On October 19, 1923, and up to and including December 28, 1923, Barker Bros., Inc. was a California corporation, engaged in the business of selling furniture and house furnishings. Its outstanding capital stock consisted of 5,750 shares of voting preferred stock, having a total par value of \$575,000, and 17,894.35 shares of common stock, having a total par value of \$1,789,435.

III.

On October 19, 1923, and up to and including December 28, 1923, the common stock of Barker Bros., Inc. of California was owned as follows:

Stockholder	No. of Shares
Charles Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased.....	3,418.19
Pauline Barker.....	1,660
Lawrence Barker, individually.....	1,841.50
F. K. Colby, Trustee.....	300
Lawrence Barker, Trustee.....	960
C. H. Barker	}.....8,187.69
C. A. Barker	
Erle P. Barker	
J. W. Beam, Trustee for certain employees of Barker California.....	1,526.97
Total	17,894.35

IV.

Prior to December 28, 1923, the cost or other basis for determining gain or loss on the sale or disposition of the shares of stock of Barker Bros., Inc. of California in the hands of the following stockholders of L. B., Inc., was:

Stockholder	No. of Shares	Basis
Estate of W. A. Barker	3,368.19	\$753,598.84
Estate of W. A. Barker	50	9,239.85
Pauline Barker	1,660	163,577.19
Lawrence Barker	1,841.50	235,031.57
Pauline Barker	1,660	163,577.19
Lawrence Barker	1,841.50	235,031.57
Lawrence Barker, Trustee	960	126,345.26
F. K. Colby, Trustee	300	38,289.15
		<hr/> \$1,326,081.86

V.

On December 28, 1923, a corporation was organized under the laws of Delaware and also known as Barker Bros., Inc.

VI.

On December 28, 1923, the holders of all the common stock of Barker Bros., Inc. of California agreed to and did exchange all of the shares of its common stock for all of the shares of the common stock of the newly organized corporation (Barker Bros., Inc. of Delaware), and were in control of the latter corporation immediately following the exchange with the same proportionate stock interests that they had previously held in the California corporation.

VII.

On December 22, 1923, a corporation known as Lawrence Barker, Incorporated, had been organized under the laws of the State of California by the plaintiff and a group of the holders of common stock in Barker Bros., Inc. of California, who had associated themselves with him. The persons in this group directed that the shares of common stock in Barker Bros., Inc. of Delaware, to which they were entitled, be issued not in their names but in the name of Lawrence Barker, Incorporated. This direction was carried out and Lawrence Barker, Incorporated, received the shares of common stock in Barker Bros., Inc. of Delaware, to which plaintiff and his associates were entitled in exchange for all of its own common stock which was, on December 28, 1923, issued to plaintiff and his said associates

in the same proportions that they were entitled to receive stock in Barker Bros., Inc. of Delaware. Plaintiff and his associates were in control of Lawrence Barker, Incorporated immediately after this exchange.

VIII.

On December 30, 1943, Lawrence Barker, the plaintiff herein, sold thirty shares of the common stock of Lawrence Barker, Inc. which he had acquired by the exchange set out above in Finding No. VII for the sum of \$5,000.00.

On March 15, 1944, Lawrence Barker, plaintiff herein, filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue for the Sixth Collection District of California and paid to such Collector on or before March 15, 1944, the entire tax liability shown on said return. The plaintiff included in his said 1943 tax return as income from capital gain the entire amount of \$5,000.00 received by him as the sales price of his thirty shares of the common stock of Lawrence Barker, Inc. as previously mentioned herein.

From the foregoing Findings of Fact the Court draws the following:

Conclusions of Law

I.

That the transactions whereby plaintiff exchanged the shares of common stock in Barker Bros., Inc. of California, which he originally owned, for common stock in Barker Bros., Inc. of Delaware and then exchanged his common stock in the

latter corporation, or his right to receive that common stock for common stock in Lawrence Barker, Incorporated, did not give rise to a gain or loss that may be recognized for federal income tax purposes within the meaning of Sections 112(b)(5) and 113(a)(6) of the Revenue Act of 1934.

II.

The thirty shares of the common stock of Lawrence Barker, Incorporated, which the plaintiff, Lawrence Barker sold on December 30, 1943, had a cost or other basis for determining gain or loss upon their sale or disposition of \$52.18 per share and plaintiff realized a capital gain of \$3,434.60 when he sold said thirty shares for \$5,000.00 on December 30, 1943.

III.

That plaintiff overpaid his federal income tax for the taxable year 1943 in the sum of \$434.61 with interest thereon as provided by law from the 15th day of March, 1944, and is entitled to have said amount refunded.

IV.

That the plaintiff is entitled to judgment against defendant for the sum of \$434.61 with interest thereon at the rate of 6% per annum from the 15th day of March, 1944, until a date preceding the issuance of a refund check by the Commissioner of Internal Revenue by not more than thirty days, and

for plaintiff's costs to be taxed by the Clerk of this Court.

Dated: This 24th day of Oct., 1950.

/s/ BEN HARRISON,
United States District Judge.

Approved as to Form, but Objections Filed September 6, 1950.

IRELL & MANELLA,
By /s/ ARTHUR MANELLA,
Attorneys for Plaintiff.

[Endorsed]: Filed October 24, 1950.

The United States District Court, Southern District
of California, Central Division
No. 9621-BH

LAWRENCE BARKER,

Plaintiff,

vs.
THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above-entitled case came on regularly for trial before the Court sitting without a jury at Los Angeles, California, on the 14th day of November, 1949, the Honorable Ben Harrison, Judge, presiding; the plaintiff appeared by Lawrence Irell and Arthur Manella, his attorneys; the defendant appeared by Ernest A. Tolin, United States Attorney

for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, its attorneys; the Court having considered the evidence, rendered its opinion and made and filed herein its Findings of Fact and Conclusions of Law.

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That the plaintiff Lawrence Barker have judgment against the defendant United States of America for the sum of \$434.61 with interest thereon at the rate of six per cent per annum from the 15th day of March, 1944, until a date preceding the issuance of a refund check by Commissioner of Internal Revenue by not more than 30 days; and for plaintiff's costs taxed in the sum of \$.

Dated: This 24th day of Oct., 1950.

/s/ BEN HARRISON,
United States District Judge.

Approved As To Form:

IRELL & MANELLA,

By /s/ ARTHUR MANELLA,
Attorneys for Plaintiff.

Judgment entered Oct. 24, 1950.

[Endorsed]: Filed October 24, 1950.

[Title of District Court and Cause.]

No. 9621-BH

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS PURSUANT TO RULE
73(b), FEDERAL RULES OF CIVIL PRO-
CEDURE

Notice Is Hereby Given that Lawrence Barker, plaintiff-appellant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final Judgment entered in the above-entitled case, which was in favor of plaintiff and against the defendant, but only to the extent of directing that plaintiff have judgment against defendant for the sum of \$434.61 with interest thereon at the rate of six per cent per annum from the 15th day of March, 1944, which Judgment was rendered on October 24, 1950.

Dated this 18th day of December, 1950.

IRELL & MANELLA,
LAWRENCE E. IRELL, and
ARTHUR MANELLA,

By /s/ ARTHUR MANELLA,
Attorneys for Plaintiff-
Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 18, 1950.

[Title of District Court and Cause]

No. 9621-BH

CASH DEPOSIT ON APPEAL

Plaintiff-appellant Lawrence Baker, by and through his attorneys Irell & Manella, Lawrence E. Irell and Arthur Manella, herewith submits a cash deposit in lieu of bond in connection with his Notice of Appeal this day filed in the above-entitled action.

This deposit, in the form of a cashier's check made payable to the Clerk of the United States District Court, is made pursuant to Rule 73(c) of the Federal Rules of Civil Procedure and in accordance with Section 8 (e) of the Rules of the District Court of the United States for the Southern District of California.

The funds used for the purpose of securing the cashier's check are owned by Lawrence Barker, plaintiff-appellant. Said fund is hereby subjected to the provisions of Section 8(c) of the Rules of the District Court of the United States for the Southern District of California, entitled "Summary Judgment Against [144] Sureties."

Dated this 18th day of December, 1950.

IRELL & MANELLA,
LAWRENCE E. IRELL, and
ARTHUR MANELLA,

By /s/ ARTHUR MANELLA,
Attorneys for Plaintiff-
Appellant.

State of California,
County of Los Angeles—ss.

On this 18th day of December, 1950, before me, the undersigned Notary Public in and for said County and State, personally appeared Arthur Manella, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

[Seal] /s/ AUGUSTA GROBE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 4, 1953.

[Endorsed]: Filed December 18, 1950. [145]

In the United States District Court
Southern District of California
Central Division

No 9620-BH-Civil

MRS. W. A. BARKER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA

Defendant.

No. 9621-BH-Civil

LAWRENCE BARKER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA

Defendant.

Honorable Ben Harrison, Judge Presiding

Appearances:

For the Plaintiffs:

MESSRS. BERGER & IRELL;
ARTHUR MANELLA, Esq.; By
ARTHUR MANELLA, Esq.

For the Defendant:

E. H. MITCHELL,
EDWARD R. McHALE,
Assistant U. S. Attorneys;
ROBT. D. SCOTT, and
JAMES D. PETTUS,
Spec. Attorneys Bureau of
Internal Revenue, By
EUGENE HARPOLD, Esq.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California, November 14, 1949

The Court: You may proceed.

The Clerk: 9620 and 9621, Mrs W. A. Barker
and Lawrence Barker against the United States of
America.

Mr. Manella: Ready for the plaintiff, your
Honor.

Mr. Harpold: We are ready, your Honor.

The Court: Do you have a complete stipulation
of facts in those cases, gentlemen?

Mr. Harpold: We have agreed to a stipulation
of facts.

The Court: Then there is no testimony to be
taken?

Mr. Manella: No testimony, your Honor.

We would like to move at this time that the two
cases be consolidated. The stipulation is prepared
in such form. They are identical as to the facts.

The Court: There is no objection to that.

Mr. Harpold: No objection.

The Court: And one brief will take care of both cases.

Mr. Harpold: Yes.

The Court: And one error will take care of two cases on my part.

Mr. Harpold: Yes.

The Court: The easiest way to settle these cases is to flip a coin.

Mr. Harpold: There is considerable controversy in this case and probably we will not be able to settle some of them.

The Court: But it will be submitted on briefs.

Mr. Harpold: Before the stipulation is finally accepted I desire to enter for the purpose of the record, an objection on the ground that they are immaterial and irrelevant to the issues that have to be decided in this case. Those objections will be to paragraphs Nos. 4, 16, 17 and 18 and that portion of paragraph 19 found on page 10 at lines 7 to 9 of the stipulation and also to the entire paragraphs numbered 20, 21, 22, 23, 24, 25, 26 and 27 of the stipulated facts.

The Court: It will be taken under submission, gentlemen. I have so many submitted matters now that it is going to take quite a while before I can reach it, so you gentlemen might as well have the advantage of that time in presenting your briefs.

Mr. Harpold: I would appreciate some little time. The office is a little bit disorganized by the loss of a man and if the court will give us time we will be grateful for it.

The Court: How about 30, 30 and 30?

Mr. Harpold: That is agreeable.

Mr. Manella: Yes, your Honor.

(Whereupon the above-entitled matter was concluded.)

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of January A.D., 1951.

Official Reporter.

[Endorsed]: Filed January 19, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 154, inclusive, contain the orig-

inal Complaint for Refund of Federal Income and Victory Taxes; Answer; Stipulation of Facts; Stipulation for Correction of Stipulation of Facts; Memorandum Opinion; Objections to Defendant's Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cash Deposit on Appeal; Designation of Record on Appeal and Statement of Points on Appeal and Counter-designation of Record on Appeal and a full, true and correct copy of Minute Order Entered November 14, 1949 which, together with Reporter's Transcript of Proceedings on November 14, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 25th day of January, A.D. 1951.

[Seal] /s/ EDMUND L. SMITH,
Clerk.

By /s/ THEO HOCKE,
Chief Deputy.

[Endorsed]: No. 12826. United States Court of Appeals for the Ninth Circuit. Lawrence Barker, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed January 27, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals
for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
Civil No. 12826

LAWRENCE BARKER,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON ON APPEAL

Appellant Lawrence Barker, through his attorneys Irell & Manella, Lawrence E. Irell and Arthur Manella, hereby states that in this appeal from the Final Judgment of the District Court entered on October 24, 1950, he intends to rely upon the following points:

1. The District Court erred in failing and omitting to find as facts all of the facts stipulated by and between the parties and agreed to by and between said parties to be material and relevant, as set forth in paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the Stipulation of Facts filed by the parties with the Court.

2. The District Court erred in failing and omitting to find as facts all of the facts stipulated by and between the parties as set forth in paragraphs IV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI and XXVII of the Stipulation of Facts filed by the parties with the Court.

3. The District Court erred in failing and omitting to find from stipulated evidence establishing the same that the exchange in 1923 by the holders of all the common stock of Barker Bros., Inc., of California, including Lawrence Barker and a group of stockholders associated with him, was done pursuant to the terms of a prior plan and agreement for the reorganization of Barker Bros., Inc., of California, entered into by and between the holders of all of the common stock of Barker Bros., Inc., of California and the banking firm of Marshall Field, Ward, Gore & Co.

4. The District Court erred in failing and omitting to find from the facts establishing the same that the final result to be accomplished, and actually accomplished, by the plan for the reorganization of Barker Bros., Inc., of California, was that Lawrence Barker and the group of owners of the common stock of Barker Bros., Inc., of California, associated with him, would receive in place of their common stock in Barker Bros., Inc., of California all of the stock of a new corporation, Lawrence Barker, Incorporated; that the remaining group of owners of the common stock of Barker Bros., Inc., of California would receive in place of their common stock in Barker Bros., Inc., of California shares of no par common stock in a new corporation, Barker Bros., Inc., of Delaware; that Barker Bros., Inc., of Delaware would receive all the assets and business of Barker Bros., Inc., of California; that Lawrence Barker, Incorporated, would receive \$1,000,000 in cash from the sale to Marshall Field,

Ward, Glore & Co. of \$1,087,000 of first preferred stock of Barker Bros., Inc., of Delaware, another \$1,000,000 of first preferred stock of Barker Bros., Inc., of Delaware subject to an option in favor of Marshall Field, Ward, Glore & Co. to purchase said shares at \$92.00 per share, and \$2,300,000 of second preferred stock of Barker Bros., Inc., of Delaware.

5. The District Court erred in finding and concluding as a matter of law that the transactions whereby appellant Lawrence Barker exchanged the shares of common stock in Barker Bros., Inc., of California which he originally owned, for stock in Barker Bros., Inc., of Delaware, and then exchanged the said latter stock for common stock in Lawrence Barker, Incorporated, did not give rise to a gain or loss that should be recognized for federal income tax purposes within the meaning of Sections 112(b) (5) and 113 (a) (6) of the Revenue Act of 1934.

6. The District Court erred in failing to find and conclude as a matter of law that the transactions in 1923, whereby appellant Lawrence Barker exchanged the shares of common stock in Barker Bros., Inc., of California which he originally owned, for stock in Barker Bros., Inc., of Delaware, and then exchanged the latter stock for common stock of Lawrence Barker, Incorporated, was a taxable exchange upon which gain or loss was recognized for federal income tax purposes within the meaning of Sections 112(a) and 113(a) of the Revenue Act of 1932.

7. The District Court erred in failing to find and conclude as a matter of law that the transactions in 1923, whereby, pursuant to the plan for the reorganization of Barker Bros., Inc., of California, that corporation transferred all of its assets and business to Barker Bros., Inc., of Delaware, and whereby Lawrence Barker transferred his common stock in Barker Bros., Inc., of California and ultimately received in place thereof stock in Lawrence Barker, Incorporated, destroyed the continuity of interest of Lawrence Barker in the transferred property.

8. The District Court erred in finding and concluding that after the exchange by the holders of the common stock of Barker Bros., Inc., of California, for the shares of stock of Barker Bros., Inc., of Delaware, said transferors were in control of Barker Bros., Inc., of Delaware, with the same proportionate stock interest that they had previously had in Barker Bros., Inc., of California.

9. The District Court erred in omitting and failing to find and conclude as a matter of law that after the exchange by the holders of the common stock of Barker Bros., Inc., of California for the shares of stock of Barker Bros., Inc., of Delaware, said transferors were not in control of Barker Bros., Inc., of Delaware, since said transferors did not own at least 80% of the total number of shares of all other classes of stock of Barker Bros., Inc., of Delaware.

10. The District Court erred in finding and concluding as a matter of law that the thirty shares of

the common stock of Lawrence Barker, Incorporated, which appellant Lawrence Barker sold on December 30, 1943, had a cost or other basis for determining gain or loss on their sale or disposition of \$52.18 per share, and that Lawrence Barker realized a capital gain of \$3,434.60 when he sold said thirty shares for \$5,000 on December 30, 1943.

11. The District Court erred in failing to find and conclude as a matter of law that the thirty shares of common stock of Lawrence Barker, Incorporated, which appellant Lawrence Barker sold on December 30, 1943, had a cost or other basis for determining gain or loss upon their sale or disposition of \$219.35 per share, and that appellant Lawrence Barker realized a capital loss of \$1,580.50 when he sold said thirty shares for \$5,000 on December 30, 1943.

12. The District Court erred in finding and concluding that the appellant Lawrence Barker overpaid his federal income tax for the taxable year 1943 only in the sum of \$434.61, and is entitled have only said amount refunded to him, together with interest thereon as provided by law, from the 15th day of March, 1944.

13. The District Court erred in failing to find and conclude as a matter of law that appellant Lawrence Barker overpaid his federal income tax for the taxable year 1943 in the sum of \$1,818.98, and is entitled to have said amount refunded, together with interest thereon as provided by law, from the 15th day of March, 1944.

[Endorsed]: Filed February 2, 1951.

No. 12826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
for the Southern District of California.

BRIEF FOR APPELLANT.

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FALLS CHURCH, VA.



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No. 12826

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the District Court [R. 136-138] and its Findings of Fact and Conclusions of Law [R. 140-146] are not officially reported.

Jurisdiction.

This appeal involves an action for the refund of federal income and victory taxes paid by the taxpayer for the calendar year 1943, in the amount of \$1,818.98. During the taxable years 1942 and 1943 and at all times since that date taxpayer has been and is a resident of the City of Los Angeles, County of Los Angeles, State of California. [R. 3.] Taxpayer filed his federal income tax return for the calendar year 1943 on March 15, 1944, with the Collector of Internal Revenue of the United States for the 6th District of California at Los Angeles, California, and paid to said Collector the tax liability described on said

return. [R. 5-6.] On March 15, 1947, taxpayer filed with said Collector of Internal Revenue a claim for refund of federal income and victory taxes for the calendar year 1943 in the amount of \$1818.98. [R. 4-5, 7-8.] Under date of July 27, 1948, taxpayer was advised by written notice by the Commissioner of Internal Revenue, pursuant to Sec. 3772(a)(2) of the Internal Revenue Code, that said claim for refund had been disallowed in full. [R. 7-8, 17.] On April 22, 1949, taxpayer filed with the District Court of the United States for the Southern District of California, Central Division, a complaint against the United States for refund of 1943 federal income and victory taxes in the amount of said previously mentioned claim for refund, under the provisions of Section 24(20) of the Judicial Code, as amended, and Title 28, United States Code, Section 1346. [R. 3, 8.] On October 24, 1950, the District Court entered judgment in favor of taxpayer against the United States but only in the amount of \$434.61 together with interest thereon from March 15, 1944. [R. 146-147.] Notice of appeal was filed by taxpayer on December 18, 1949. [R. 148.] Jurisdiction is conferred on this Court by Title 28, United States Code, Sections 1291 and 1294.

Question Presented.

Where holders of all the common stock of Barker Bros., Inc., of California (California) including the Lawrence Barker Interests, pursuant to a plan, transferred said stock in 1923, to Barker Bros., Inc., of Delaware (Delaware) in exchange for \$9,569,700 of Delaware stock; but where as part of the plan, the Lawrence Barker Interests first became contractually obligated to sell and did convey to Marshall Field, Gore, Ward & Co. (Bankers) for cash \$2,087,000 of the \$9,569,700 of Delaware stock, were the

California stockholders in "control" of Delaware after the transfer so as to constitute the exchange a tax-free one within Section 112(b)(5) of the Revenue Act of 1932?

Statutes and Regulations Involved.

STATUTES.

Internal Revenue Code, Sec. 113, Adjusted Basis for Determining Gain or Loss.

- (a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

.

- (12) *Basis established by Revenue Act of 1932.*—If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1934, and the basis thereof, for the purposes of the Revenue Act of 1932, 47 Stat. 199, was prescribed by section 113(a) (6), (7), or (9) of such Act, then for the purposes of this chapter the basis shall be the same as the basis therein prescribed in the Revenue Act of 1932.

Revenue Act of 1932, Section 113, Adjusted Basis for Determining Gain or Loss.

- (a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

.

- (6) *Tax-Free Exchanges Generally.*—If the property was acquired upon an exchange described in section 112(b) to (e), inclusive, the basis

shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112(b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

Revenue Act of 1932, Section 112, Recognition of Gain or Loss.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

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(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immedi-

ately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

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- (j) *Definition of control.*—As used in this section the term “control” means the ownership of at least 80 percentum of the voting stock and at least 80 percentum of the total number of shares of all other classes of stock of the corporation.

REGULATIONS.

Treasury Regulations 111, under Internal Revenue Code.

Reg. 111, Sec. 29.113(a)(12)-1. *Basis of Property Establishd by Revenue Act of 1932.*—Section 113(a)(12) provides that if the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1934, and the basis of the property, for the purposes of the Revenue Act of 1932, was prescribed by section 113(a) (6), (7), or (9) of that Act, then for the purposes of the Internal Revenue Code the basis shall be the same as the basis therein prescribed in the Revenue Act of 1932.

Treasury Regulations 77, under Revenue Act of 1932.

Reg. 77, Art. 597. *Property acquired upon an exchange.*—In the case of property acquired after February 28, 1913, upon an exchange described in section 112(b), (c), (d), or (e) (see articles 572-577), the basis is the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount

of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made.

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Reg. 77, Art. 572. *Exchanges of property*.—In the following cases no gain or loss is recognized:

(c) If property, real, personal, or mixed, is transferred to a corporation (1) by one person solely in exchange for stock or securities in such corporation, and immediately after the exchange such person is in control of the corporation, or (2) by two or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such persons are in control of the corporation, and the amount of stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. See section 112(j) and article 577 for definition of “control”.

Example: A owns a patent right worth \$25,000 and B a manufacturing plant worth \$75,000. A and B organize the X Corporation with a capital stock of \$100,000. A transfers his patent right to the X Corporation for \$25,000 of its stock; B transfers his plant to the X Corporation for \$75,000 of its stock. No gain or loss is recognized from this transaction.

Reg. 77, Art. 577. *Definitions*.—

.

A person is, or two or more persons are, “in control” of a corporation, within the meaning of section 112, when owning—

- (1) At least 80 per cent of the voting stock, and
- (2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

Statement.

Up to and including December 28, 1923, Barker Bros., Inc., a California corporation, hereinafter called California, was engaged in the business of selling furniture and household furnishings in Los Angeles, California. Its outstanding capital stock consisted of 5750 shares of voting preferred stock of a total par value of \$575,000, and 17,894.35 shares of common stock, of a total par value of \$1,789,435. Of the 17,894.35 shares of California common stock, 8179.69 shares were owned in varying amounts by Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased, Lawrence Barker, individually (taxpayer herein), Lawrence Barker, trustee, Mrs. W. A. (Pauline) Barker, and F. K. Colby, Trustee, which group of persons is hereinafter referred to as the Lawrence Barker Interests. The remaining shares of common stock of California were owned by a group of persons hereinafter referred to as the C. H. Barker Interests, and by certain employees of California. [R. 22-23.]

In the latter part of 1923, the Lawrence Barker Interests decided to withdraw from participation in the business of California and to dispose of their entire stock interest in that corporation. On October 19, 1923, the Lawrence Barker Interests entered into an agreement with Hunter, Dulin & Co., under the terms of which Hunter, Dulin & Co. was given an option to purchase the California stock owned by the Lawrence Barker Interests for a price per share to be determined by valuing the entire net worth of California at \$10,500,000. A verbal understanding had been reached with the C. H. Barker Interests and the employee group that they also would sell their entire stock interest in California to Hunter, Dulin & Co. for

a price to be determined by valuing the entire net worth of California at \$10,500,000. [R. 24, 41-44.] Because of the inability of the Lawrence Barker Interests to persuade the C. H. Barker Interests to sell their stock in accordance with the Hunter Dulin & Co. agreement, the option held by Hunter, Dulin & Co. was subsequently relinquished by it upon the payment to it by the Lawrence Barker Interests of \$50,000 in cash. The plan later adopted on December 20, 1923, was predicated on the agreement of Marshall Field, Gore, Ward & Co., hereinafter referred to as Bankers, to finance the sale by the Lawrence Barker Interests of their interest in California, but contemplated that the C. H. Barker Interests would retain their interest in the business of California. The Lawrence Barker Interests promised Hunter, Dulin & Co., that if the Bankers' plan did not materialize, the Lawrence Barker Interests would reinstate the original option held by Hunter, Dulin & Co. to purchase their California stock by valuing the entire net worth of that company at \$10,500,000, and would give Hunter, Dulin & Co. full cooperation in obtaining in writing the verbal understanding which had been reached with the C. H. Barker Interests and the employee group to effect the sale of their California stock on the same basis, as originally contemplated. [R. 24, 43-44.]

On December 20, 1923, the Lawrence Barker Interests entered into an agreement with the C. H. Barker Interests, under the terms of which the following plan was adopted: A new corporation, Barker Bros., Incorporated, a Delaware corporation, hereinafter called Delaware, was to be organized with an authorized capital stock of \$15,000,000, divided into \$2,500,000 of First Preferred stock, \$2,500,000 of Second Preferred stock, and \$10,000,000 par value temporary common stock. Delaware, in exchange

for its par value temporary common stock, would acquire from the Lawrence Barker Interests and the C. H. Barker Interests, together with the employee group, all the common stock of California. The par value temporary common stock of Delaware would be immediately returned to Delaware and replaced by (1) \$2,087,000 of Delaware First Preferred stock and \$2,300,000 of Delaware Second Preferred stock issued for the California stock transferred to Delaware by the Lawrence Barker Interests, and (2) 100,000 shares of Delaware no par value common stock issued for the California stock transferred to Delaware by the C. H. Barker Interests. Of the \$2,087,000 of Delaware First Preferred stock and \$2,300,000 of Delaware Second Preferred stock issued by Delaware in exchange for the California stock transferred to Delaware by the Lawrence Barker Interests, \$1,087,000 of the First Preferred stock would be sold for cash to Bankers, who would also be given an option to purchase the remaining \$1,000,000 of First Preferred stock. Bankers would also purchase from Delaware \$413,000 of the latter's remaining unissued First Preferred stock in order to provide Delaware with the funds necessary to redeem the outstanding preferred stock of California, which latter company would then be dissolved and its assets and business taken over by Delaware. The Lawrence Barker Interests were to form another corporation, Lawrence Barker, Incorporated, hereinafter referred to as Securities Company. In exchange for all of Securities Company's stock issued to the Lawrence Barker Interests, Securities Company would receive the \$2,300,000 of Delaware Second Preferred stock and also the proceeds from the sale to Bankers of the \$2,087,000 of Delaware First Preferred stock to which the Lawrence Barker Interests were entitled by virtue of the transfer to Delaware of their California stock. [R. 24, 45-56.]

As part of the plan, the aforementioned agreement between the Lawrence Barker Interests and the C. H. Barker Interests provided that Delaware would expressly assume all the stockholders' liability of the Lawrence Barker Interests for all the indebtedness of California, and Delaware would indemnify and hold harmless the Lawrence Barker Interests from any and all such liability. [R. 53-54.]

Also on December 20, 1923, the Lawrence Barker Interests and the C. H. Barker Interests entered into an agreement with Bankers. By the terms of this agreement the previously mentioned agreement between the Lawrence Barker interests and the C. H. Barker Interests, setting forth the aforementioned plan, was affirmed. Bankers agreed to purchase for cash \$1,087,000 of the Delaware First Preferred stock and were given an option to purchase the remaining \$1,000,000 of Delaware First Preferred stock, all of which stock, together with \$2,300,000 of Delaware Second Preferred stock, was to be issued as consideration for the California stock transferred by the Lawrence Barker Interests to Delaware. [R. 24-25, 56-63.]

Both of the above mentioned agreements were carried out.

On December 28, 1923, Delaware was organized with an authorized capital stock of 25,000 shares First Preferred stock, 25,000 shares Second Preferred stock, 100,000 shares of temporary Common stock, all having a par value of \$100 per share. At its first meeting, on December 28, 1923, the Board of Directors considered and accepted the offers of the holders of all California common stock (17,894.35 shares) to exchange their stock for \$9,569,700 par value (95,697 shares) of Delaware temporary Common stock. In accordance with the terms of these

offers, Delaware temporary Common stock was issued in exchange for the California common stock, as follows:

California Common Stockholders	Number of California Common Shares Exchanged	Number of Delaware Common Shares Issued
C. H. Barker Interests	8,187.69)	43,946.09)
Employee Group	1,300.97)	6,945.91)
Lawrence Barker Interests	8,179.69	43,870.00
J. W. and Martha Beam	226.00	935.00
TOTAL	<u>17,894.35</u>	<u>95,697.00</u>
	=====	=====

At the same meeting, Delaware entered into an agreement with the Lawrence Barker Interests whereby in consideration of the transfer to Delaware of the California common stock owned by the Lawrence Barker Interests, Delaware agreed to assume all the stockholders' liability of the Lawrence Barker Interests for the debts of California and to indemnify and hold harmless the Lawrence Barker Interests from any and all such liability. [R. 77-78.]

On the following day, December 29, 1923, the 43,870 shares of Delaware temporary Common stock issued by Delaware for the California stock transferred to it by the Lawrence Barker Interests, were replaced by 20,870 shares of Delaware First Preferred and 23,000 shares of Delaware Second Preferred. [R. 29, 103-105.] Subsequently Bankers acquired for cash 10,870 shares of said Delaware First Preferred stock. [R. 36.] Also, from February 11, 1924 to May 16, 1924, Bankers exercised their option to acquire, and did acquire, the remaining 10,000 shares of said Delaware First Preferred stock. [R. 30-32, 36.] Also on December 29, 1923, the 935 shares of Delaware tempo-

rary Common stock issued by Delaware for the California stock transferred to it by J. W. and Martha Beam were replaced by 935 shares of Delaware Second Preferred stock. [R. 106.]

Also on December 28, 1923, the Lawrence Barker Interests caused Securities Company to be formed. Securities Company, in exchange for all of its stock, issued to the Lawrence Barker Interests, became entitled to receive the proceeds from the sale to Bankers of the 10,870 shares of Delaware First Preferred stock, the remaining 10,000 shares of Delaware First Preferred stock, subject to Bankers' option to acquire the same for cash, and the 23,000 shares of Delaware Second Preferred stock, all of which the Lawrence Barker Interests were entitled to by virtue of their transfer to Delaware of their California stock. [R. 27-29, 84-103.]

On January 5, 1924, Delaware issued to the C. H. Barker Interests and the employee group 100,000 shares of Delaware no par common stock in exchange for its previously issued 50,892 shares of temporary common stock. In February, 1924, California conveyed all its assets to Delaware, subject to all the outstanding liabilities, including the liability for the outstanding preferred stock of California, which Delaware assumed. Thereafter Delaware redeemed all the outstanding preferred stock of California. [R. 33-34.]

On December 28, 1923, the fair market value of the 8179.69 shares of California common stock owned by the Lawrence Barker Interests was \$4,387,000, which if apportioned among the 20,000 shares of Securities Company

stock received by the Lawrence Barker Interests equals \$219.35 per share. [R. 32.]

On December 28, 1923, the total cost or other basis for determining gain or loss on the sale or disposition of the 8179.69 shares of California common stock owned by the Lawrence Barker Interests was \$1,326,081.86. Of said 8179.69 shares, taxpayer individually owned 1841.50 shares having a basis for determining gain or loss of \$235,031.57, which basis if apportioned among the 4504.13 shares of Securities Company stock received by taxpayer (out of a total of 20,000 shares issued to the Lawrence Barker Interests), equals \$52.18 per share. [R. 28, 32.]

On December 28, 1943, taxpayer sold, for a price of \$5,000, 30 shares of the stock of Securities Company which taxpayer had acquired in 1923, in the transaction above described. [R. 39-40.] Taxpayer included in his 1943 tax return, as income from capital gain, the entire amount of \$5,000 received by him as the sale price of his 30 shares of Securities Company stock, thus using a basis of zero for gain or loss upon the sale of such shares. [R. 5-6.]

On March 15, 1947, taxpayer duly executed and filed with the Collector of Internal Revenue for the Sixth District of California a claim for refund of federal income taxes for the calendar year 1943, in the amount of \$1,818.98, alleging, as he does herein, that his basis for gain or loss upon the disposition of 30 shares of Securities Company stock was \$219.35 per share, or \$6,580.50 for 30 shares, and that no gain, but a loss in the amount of \$1,580.50 was therefore realized upon the disposition in 1943 of such 30 shares.

Specification of Errors.

1. The District Court erred in failing and omitting to find as facts all of the facts stipulated by and between the parties and agreed to by and between said parties to be material and relevant, as set forth in paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the Stipulation of Facts filed by the parties with the Court.

2. The District Court erred in failing and omitting to find as facts all of the facts stipulated by and between the parties as set forth in paragraphs IV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI and XXVII of the Stipulation of Facts filed by the parties with the Court.

3. The District Court erred in failing and omitting to find from stipulated evidence establishing the same that the exchange in 1923 by the holders of all the common stock of Barker Bros., Inc., of California, including taxpayer and a group of stockholders associated with him, and the sale to Marshall Field, Glore, Ward & Co. (Bankers) of \$2,-087,000 of First Preferred stock of Barker Bros., Inc., of Delaware, was done pursuant to the terms of a prior plan and agreements entered into by and between the holders of all of the common stock of Barker Bros., Inc., of California and the banking firm of Marshall Field, Glore, Ward & Co. (Bankers).

4. The District Court erred in finding and concluding as a matter of law that the transaction whereby taxpayer exchanged the shares of common stock in Barker Bros., Inc., of California which he originally owned, for stock in

Barker Bros., Inc., of Delaware, did not give rise to a gain or loss that should be recognized for federal income tax purposes within the meaning of Sections 112(b)(5) and 113(a)(6) of the Revenue Act of 1934. [Conclusions of Law, No. I, R. 144-145.]

5. The District Court erred in failing to find and conclude as a matter of law that the transaction in 1923, whereby taxpayer exchanged the shares of common stock in Barker Bros., Inc., of California which he originally owned, for stock in Barker Bros., Inc., of Delaware, was a taxable exchange upon which gain or loss was recognized for federal income tax purposes within the meaning of Section 112(a) and 113(a) of the Revenue Act of 1932.

6. The District Court erred in finding and concluding that after the exchange by the holders of the common stock of Barker Bros., Inc., of California, for the shares of stock of Barker Bros., Inc. of Delaware, said transferors were in control of Barker Bros., Inc., of Delaware, with the same proportionate stock interest that they had previously had in Barker Bros., Inc., of California. [Findings of Fact, No. VI, R. 143.]

7. The District Court erred in omitting and failing to find and conclude as a matter of law that after the exchange by the holders of the common stock of Barker Bros., Inc., of California for the shares of stock of Barker Bros., Inc., of Delaware, said transferors were not in control of Barker Bros., Inc., of Delaware, since said transferors did not own at least 80% of the stock of Barker Bros., Inc., of Delaware.

8. The District Court erred in finding and concluding as a matter of law that the 30 shares of the common stock of Lawrence Barker, Incorporated (Securities Company), which taxpayer sold on December 30, 1943, had a cost or other basis for determining gain or loss on their sale or disposition of \$52.18 per share, and that taxpayer realized a capital gain of \$4,434.60 when he sold said 30 shares for \$5,000 on December 30, 1943. [Conclusions of Law, No. II, R. 145.]

9. The District Court erred in failing to find and conclude as a matter of law that the 30 shares of common stock of Lawrence Barker, Incorporated (Securities Company), which taxpayer sold on December 30, 1943, had a cost or other basis for determining gain or loss upon their sale or disposition of \$219.35 per share, and that taxpayer realized a capital loss of \$1,580.50 when he sold said 30 shares for \$5,000 on December 30, 1943.

10. The District Court erred in finding and concluding that taxpayer overpaid his federal income tax for the taxable year 1943 only in the sum of \$434.61, and is entitled to have only said amount refunded to him, together with interest thereon as provided by law, from the 15th day of March, 1944. [Conclusions of Law, No. III, R. 145.]

11. The District Court erred in failing to find and conclude as a matter of law that taxpayer overpaid his federal income tax for the taxable year 1943 in the sum of \$1,-818.98, and is entitled to have said amount refunded, together with interest thereon as provided by law, from the 15th day of March, 1944.

Summary of Argument.

Pursuant to the agreements entered into on December 20, 1923, by and between the Lawrence Barker Interests and the C. H. Barker Interests and Bankers, a plan was adopted which would enable the Lawrence Barker Interests to sell their interest in California and which at the same time would permit the C. H. Barker Interests to retain their interest in California. The above mentioned agreements provided that all of the California common stockholders, including the Lawrence Barker Interests, would transfer their California stock to Delaware, a newly organized corporation. In exchange for said California stock Delaware would issue \$9,569,700 of its stock, \$4,387,000 of which, in the form of Preferred stock, would be issued for the California stock transferred to Delaware by the Lawrence Barker Interests. As part of said agreements the Lawrence Barker Interests contractually obligated themselves to, and did, transfer to Bankers \$2,087,000 of the Delaware Preferred stock. Said \$2,087,000 of Delaware preferred stock comprised more than 20 per cent of Delaware's total stock (\$9,569,700). The California common stockholders who transferred their California stock to Delaware were therefore not in "control" of Delaware after the transfer, within the meaning of Section 112(b) (5), since they owned less than 80% of Delaware's stock. The exchange thus was not a tax-free exchange, and the basis to the Lawrence Barker Interests of the Delaware stock issued was the cost to them of that stock, *i. e.*, the fair market value, \$4,387,000, of the California stock given in exchange therefor. It necessarily follows that the basis of the 20,000 shares of Securities Company stock in the hands of the Lawrence Barker Interests is also \$4,387,000, or \$219.35 per share.

ARGUMENT.

The 1923 Exchange, Whereby All the Common Stockholders of California Exchanged Their Stock for Stock of Delaware, Was Not a Tax-free Exchange Within Section 112(b)(5) Because Said California Stockholders Were Not in Control of Delaware After the Transfer.

Gain or loss upon the sale, exchange or other disposition of property is determined by the difference between the amount realized therefrom and the basis of such property. (Internal Revenue Code, Sec. 111(a).) It is agreed that taxpayer realized \$5,000 from his disposition in 1943 of 30 shares of Securities Company stock. [R. 39-40, 144.] The dispute between the parties herein is concerned solely with the question of what is the basis to taxpayer of such Securities Company stock.

Section 113(a) of the Internal Revenue Code provides that the basis of property "shall be the cost of such property." Normally, an exchange is taxable (Section 112(a) of the Internal Revenue Code), and if stock is received in exchange for property, the cost of the stock is the fair market value of the property exchanged therefor. (*Nathaniel J. Hess v. Commissioner*, 24 B. T. A. 475; *Standard Fuel & Material Co. v. Commissioner*, 29 B. T. A. 51; *United States v. Dickinson*, 95 F. 2d 65 (C. C. A. 1st, 1938); *Helvering v. Williams, et al.*, 97 F. 2d 810 (C. C. A. 2d, 1938); *John Levene v. Commissioner*, T. C. Memo. Op. Aug. 5, 1944, C. C. H. Dec. 14,080(M); *Mertens, Law of Federal Income Taxation*, Vol. 3, Sec. 21.15.) As an exception to the general rule that the basis of property is its cost, Section 113(a)(6) of the Internal Revenue Code (and the Revenue Act of 1932) provides that if property was acquired through a tax-free exchange,

as described in Section 112(b)(5) of the Internal Revenue Code (and the Revenue Act of 1932), the basis of the property received is not cost, *i. e.*, the fair market value of the property exchanged therefor, but rather is the basis of the property exchanged therefor.¹ There is no controversy between the parties as to the correctness of the foregoing legal propositions.

In the instant case it is stipulated that on December 28, 1923, the cost or other basis to taxpayer of the 1841.50 shares of California stock transferred by him to Delaware for a portion of the \$4,387,000 of Delaware stock issued by the latter corporation in exchange for all of the California stock transferred to it by the Lawrence Barker Interests, was \$235,031.57.² [R. 32.] The lower court concluded that the 1923 exchange, whereby all of the common stockholders of California exchanged their stock for Delaware stock, was a tax-free exchange within the meaning of Section 112(b)(5), on the ground that said California stockholders were in control of Delaware immediately following the exchange with the same proportionate stock interests that they had previously held in California.

¹Since the taxpayer acquired his L. B. Inc. shares in a 1923 transaction, Section 113(a)(12) of the Internal Revenue Code provides that his basis for those shares shall be the basis prescribed in the Revenue Act of 1932. However, Section 113(a), Section 113(a)(6), and the relevant portions of Section 112(a) and (b) of the Revenue Act of 1932 are identical to the same numbered sections of the Internal Revenue Code. The same is true with respect to the Revenue Act of 1934, to which the lower Court referred.

²The Lawrence Barker Interests transferred to Delaware 8,179.69 shares of California common stock, for which Delaware issued \$2,087,000 of its First Preferred stock and \$2,300,000 of its Second Preferred stock. The total cost or other basis to the Lawrence Barker Interests of said 8,179.69 shares of California stock was \$1,326,081.86, of which taxpayer owned 1,841.50 shares, having a cost or other basis of \$235,031.57. [R. 32.]

The court thus determined that the basis to the taxpayer of his California stock, *i. e.*, \$235,031.57, should be carried over to the Delaware stock issued in exchange therefor and also to his Securities Company stock, thus resulting in a basis of \$52.18 for each share of Securities Company stock received by the taxpayer. [R. 143-145.]

It is also stipulated in the instant case that on December 28, 1923, the fair market value of the 8179.69 shares of California common stock transferred by the Lawrence Barker Interests, including taxpayer, to Delaware for \$4,387,000 of the latter's stock was \$4,387,000. [R. 32.] If, as taxpayer contends, the 1923 exchange, whereby all the common stockholders of California exchanged their stock for Delaware stock, was not a tax-free exchange within the meaning of Section 112(b)(5) because the California stockholders were not in control of Delaware immediately after the transfer, then the basis to the Lawrence Barker Interests of said Delaware stock is the cost to them of such stock, *i. e.*, \$4,387,000. In such event, the basis of the 20,000 shares of the Securities Company stock issued to the Lawrence Barker Interests, including taxpayer, would likewise be \$4,387,000, or \$219.35 per share.

The issue for determination therefore is whether, after the 1923 exchange whereby all the common stockholders of California exchanged their stock for 95,697 shares of Delaware stock, said California stockholders were in "control" of Delaware so as to constitute the transaction a tax-free exchange within the meaning of Section 112(b)(5).

Section 112(b)(5) of the Revenue Acts of 1932 and 1934 provides:

"Transfer to corporation control by transferor.—
No gain or loss shall be recognized if property is

transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange”

Section 112(j) of the Revenue Act of 1932, and 112(h) of the Revenue Act of 1934, provides:

*“Definition of control—*As used in this section, the term “control” means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.”

On December 28, 1923, all the California common stockholders, including the Lawrence Barker Interests, transferred their 17,894.35 shares of California stock to Delaware. In exchange therefor, Delaware issued its stock as follows: \$2,087,000 of First Preferred stock (20,870 shares) and \$2,300,000 of Second Preferred stock (23,000 shares) for the 8,179.69 shares of California stock transferred by the Lawrence Barker Interests; \$5,089,200 of common stock (50,892 shares) for the 9,488.66 shares of California stock transferred by the C. H. Barker Interests and Employee Group; and \$93,500 of Second Preferred stock (935 shares) for the 226 shares of California stock transferred by J. W. and Martha Beam. At that moment,

Delaware had outstanding total stock in the amount of \$9,569,700.³

Before it can be said that the exchange by all of the California common stockholders of their California stock for Delaware stock was a tax-free exchange within the meaning of Section 112(b)(5), it is necessary to conclude that such stockholders owned at least 80% of the stock of Delaware. (See Sections 112(b)(5) and 112(j) of the Revenue Act of 1932.) However, the Lawrence Barker Interests, under their contract of December 20, 1923, with Bankers, were contractually obligated to sell to Bankers the entire amount of the \$2,087,000 of Delaware First Preferred stock. \$1,087,000 of said First Preferred stock was conveyed to Bankers for cash immediately, and the balance of \$1,000,000 of First Preferred stock was conveyed to Bankers for cash pursuant to the exercise by Bankers of the option which had previously been granted Bankers by the Lawrence Barker Interests. Since the Lawrence Barker Interests, as part of the original plan and agreements, were obligated to sell to Bankers said \$2,087,000 of Delaware First Preferred stock, and since said stock comprised more than 20% of the total outstanding stock of Delaware (20% of \$9,569,700 equals \$1,913,940), it cannot be said that after the transfer the California stockholders as transferors were in "control" of Delaware through the ownership of more than 80% of the stock of Delaware.

An examination of the pertinent authorities will demonstrate the correctness of taxpayer's position.

³On January 3, 1924, Delaware authorized the issuance of an additional 413,000 of its First Preferred stock to Bankers, all in accordance with the December 20, 1923, agreement previously entered into with Bankers. Said stock was thereupon issued to Bankers. [R. 30, 121-122.]

In *Bassick v. Commissioner*, 85 F. 2d 8 (C. C. A. 2d 1936), cert. den. 299 U. S. 592, the taxpayers, as stockholders of the Bassick Company, in January, 1923, entered into an agreement with Central Securities Company whereby a new corporation, Bassick-Alemite Corporation, would be formed with an authorized capital of 200,000 shares of no par common stock. The Central Securities Company, having acquired the right to 5000 shares of stock of the Bassick Manufacturing Company, agreed to transfer said shares to the new company for 52,500 shares of stock of the new corporation. The taxpayers agreed to transfer to the new corporation their stock in the Bassick Company in exchange for the remaining 147,500 shares of the new corporation's stock, plus notes. At the same time, the taxpayers obligated themselves to sell 65,000 of said 147,500 shares for \$1,300,000. The above steps were carried out in February of 1923. The taxpayers contended that the transfer by them of their stock in Bassick Company for the stock of the new company, Bassick-Alemite Corporation, was a tax-free exchange within Section 202(c)(3) of the Revenue Act of 1921, the provisions of which were identical to that of Section 112(b)(5) of the Revenue Acts of 1932 and 1934. The Second Circuit Court of Appeals, however, held that the transaction was not a tax-free exchange because of the fact that the taxpayers, even though originally receiving 147,500 shares of the stock of Bassick-Alemite Corporation, were obligated to transfer 65,000 of these shares, as part of the plan, and therefore could not be said to be in "control" of the transferee company immediately after the exchange. The Court declared:

"When the Bassick-Alemite Corporation transferred the 147,500 shares to Bassick, it had not yet issued its remaining common stock, so that Bassick

was then the owner of 100% of the outstanding shares. He sold, as he was under obligation to sell, 65,000 of these shares to the Central Securities Company as part of the same transaction. Further, as part of the same plan, the Bassick-Alemite Corporation was then obligated to and did transfer to the Central Securities Company, the remaining 52,500 shares of its authorized no par common stock in exchange for the 5,000 shares of the Bassick Manufacturing Company stock held by the Central Securities Company. If either of these facts be given weight, Bassick and the stockholders he represented, were not 'in control' of the Bassick-Alemite Corporation, since he would not own 80 per centum of the transferee corporation 'immediately after the transfer.'

* * * * *

"It is further to be noted that the stockholders were bound before the receipt of the 147,500 shares to sell 65,000 to the Central Securities Company. These shares were never delivered to the Bassick Company shareholders; Bassick deposited them with a trust company for delivery according to the prearranged plan, for \$1,300,000.00. This fact, as well as the fact that Bassick-Alemite had not been effectively organized at the date the petitioner would have us consider would be sufficient to hold that this sale did not come within Section 202(c)(3) of the Revenue Act of 1921."

In the case of *Schumacher Wall Board Corp. v. Commissioner*, 93 F. 2d 79 (C. C. A. 9th, 1937), this Court reached the same conclusion as the Second Circuit Court of Appeals had reached in the *Bassick* case. In the *Schumacher* case, Hunter, Dulin & Co., in 1926, as the owner of all of the stock of the old corporation, entered into an

agreement which contemplated the following: all the assets of the old corporation would be conveyed to a new corporation (taxpayer) in exchange for all of the stock of the new company, *i. e.*, 59,990 common shares and 30,000 preferred shares. Hunter, Dulin & Co. would obligate themselves to transfer for cash 49,075 shares of the common stock of the new company to three ultimate transferees, who previously had had no interest in the old company. The plan was carried out. The issue involved was whether, as the government contended, the provisions of Section 113(a)(7) of the Revenue Act of 1928 were applicable in determining the basis of the transferred assets in the hands of the corporation. That section, which contained language similar to that in Section 112(b)(5) of the Revenue Acts of 1932 and 1934, provided that in the case of transferred property, the property in the hands of the transferee should have the same basis as it would in the hands of the transferor if "immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them." This Court concluded that even though all of the stock of the new company had originally been issued to Hunter, Dulin & Co., since Hunter, Dulin & Co., as part of the plan, was obligated to transfer more than 20 per cent of such stock to other persons, it could not be said that "immediately after the transfer an interest or control * * * of 80 per centum or more remained in the same persons or any of them." Judge Denman, speaking for a unanimous court, said:

"In the light of uncontradicted evidence in the record, showing that Hunter, Dulin & Co. was, previous to the transfer of assets, bound by contract to convey to the three ultimate transferees the bulk of the taxpayer's common stock received from the old company,

we interpret this finding of 'the general plan' to include this contractual obligation.

"* * * immediately after the transfer of assets, Hunter, Dulin & Co., pursuant to contract with the transferor corporation, received stock of the taxpayer in excess of 80 per cent controlling interest; *that at the instant of receiving this new stock*, Hunter, Dulin & Co. was bound by contract to convey the greater part of it to the three ultimate transferees; and that, in pursuance of this obligation, it did so transfer the new stock.

"On these facts the Commissioner urges that the instant before and the instant after the transfer of assets from the old corporation to the taxpayer, an interest of 80 per cent or more remained in the same person or persons, namely, Hunter, Dulin & Co., and that hence the basis of gain, loss, and depreciation under the statute, is the same as it would have been in the hands of the old corporation.

"Conceding, as it must, this momentary continuation of an interest of over 80 per cent in Hunter, Dulin & Co., the taxpayer argues that due to the series of contractual obligations by which Hunter, Dulin & Co., had previously bound itself, first, to acquire the stock of the old company, then to accept the stock of the new, and, lastly, to transfer the majority of the new stock to three other concerns, the series of transactions must be viewed as a unit, and the ownerships of 80 per cent compared at the beginning and end of the consummation of the entire plan. In this view of the case, Hunter, Dulin & Co. did not retain sufficient control to bring the situation within the statute.

"The Board adopted the taxpayer's contention, holding that 'the question of control is to be determined by the situation existing at the time of the comple-

tion of the plan rather than at the time of the fulfillment of one of the intermediate steps.'

"We agree with the holding of the Board.

* * * * *

"It is squarely within our decision in *Halliburton v. Commissioner* (CCA-9), 78 Fed. (2) 265, 267 * * *. The two taxpayers in that case were sole members of a partnership engaging in oil well cementing. Taxpayers entered into a contract with seven oil companies, which contract provided for the formation of a new corporation to take over the assets and business of the partnership. The new corporation was to have an authorized capital stock of 3,500 shares, of which the taxpayers were to have 1,780 and the oil companies 1,300. When the assets of the partnership were transferred to the new corporation, the taxpayers received their 1,780 shares. It was not until 22 days later that the remaining 1,300 shares were issued to the oil companies, as provided in the contract. Therefore, during the interim, the taxpayers held the entire outstanding stock of the corporation. We held that notwithstanding this ownership, the pre-existing contractual arrangement negated the proposition that an 80 per cent interest or control remained in the transferor taxpayers.

"Equally conclusive of the present appeal are *Hazeltine Corporation v. Commissioner* (CCA-3), 89 Fed. (2) 513, 518, *Bassick v. Commissioner* (CCA-2), 85 Fed. (2) 8, 10 (cert. den. 299 U. S. 535), and *Von's Co. v. Comm.* (CCA-9), No. 8154, Nov. 24, 1937."

As noted by this Court in the *Schumacher* case, the same conclusion had been previously reached by the Third Circuit Court of Appeals in *Hazeltine Corp. v. Commissioner*,

89 F. 2d 513 (C. C. A. 3d, 1937), the facts of which were almost identical to those in the *Schumacher* case. In the *Hazeltine* case, the Hazeltine Research Corporation entered into a contract with the investment firm of Foster, McConnell & Company, pursuant to which assets of the former company were transferred to a new corporation (taxpayer) in exchange for more than 80 per cent of the new corporation's stock, *i. e.*, 155,250 shares. At the same time Hazeltine Research Corporation obligated itself to transfer to the investment firm 135,000 shares of the new company. The issue for determination was the basis of the transferred assets in the hands of the new company. The Third Circuit Court of Appeals stated that "The determination of this question in turn depends, under Section 113(a)(7) and 112(b)(5) of the Revenue Act of 1928, upon whether immediately after the transfer on February 19, 1924, Hazeltine Research Corporation retained 80 per cent control of the stock of the petitioner." It then concluded that since "the transaction must be viewed as a whole," and since the Hazeltine Research Corporation was obligated to transfer to the investment company stock of the petitioner in an amount which left the Hazeltine Research Corporation with less than 80 per cent of the petitioner's stock Hazeltine Research Corporation did not have control of the petitioner immediately after the transfer within the meaning of Sections 113(a)(7) and 112(b)(5) of the Revenue Act of 1928.

The United States Court of Claims has also unanimously reached the same conclusion set forth in the previously discussed cases. In *National Rubber Machinery Co. v. United States*, 38 Fed. Supp. 260 (C. Cl. 1941), the taxpayer, a newly organized corporation, pursuant to a previously agreed upon plan, issued all of its stock (82,080

shares) to six corporations which transferred property to it in exchange therefor. The government contended that the basis to the taxpayer of the properties acquired, was determined by Sections 113(a)(7) and 113(a)(8) of the Revenue Act of 1928, both of which sections required as a condition of their applicability that immediately after the transfer the transferors be in control of the transferee through the ownership of not less than 80 per cent of its stock. Pursuant to a previous decision⁴ the government conceded that in determining whether the transferors owned 80 per cent of the stock of the transferee, there was to be ignored 4,000 shares issued to one of the transferors, *i. e.*, The Banner Machine Company, "*because of the fact that prior to its receipt of these shares the Banner Machine Company had entered into a binding option to sell them and because the option was later exercised and the shares were in fact sold.*" (Italics supplied.) It argued, however, that even without the 4,000 shares originally issued to the Banner Machine Company, the transferors others than the Banner Machine Company owned more than 80 per cent of the transferee corporation's stock. However, the United States Court of Claims found that one of said other transferors (J. A. Sisto & Co.) had also entered into a binding obligation to sell the shares issued to it and had in fact so sold them. As a result, the Court, relying on this Court's decision in the *Schumacher Wall Board* case, concluded that the original transferors, being left with less than 80 per cent of the stock of the transferee corporation, were not therefore in control of it immediately after the transfer.

⁴See *Banner Machine Co. v. Rontzahn*, 107 F. 2d 147 (C. C. A. 6, 1939), cert. den. 309 U. S. 676, reh. den. 310 U. S. 656.

See also,

Columbia Oil & Gas Co. v. Commissioner, 41 B. T. A. 38, aff'd 118 F. 2d 459 (C. C. A. 5th, 1941);

Heberlein Patent Corp. v. United States, 105 F. 2d 965 (C. C. A. 2d, 1939).

In the instant case, it must be remembered that from the outset of the proceedings begun in the latter part of 1923, it was the intention and desire of the Lawrence Barker Interests to withdraw completely from participation in the business of California and to dispose of their entire common stock interest in that corporation for cash. The original agreement of October 19, 1923, with Hunter, Dulin & Co., giving the latter the option to buy the California stock of the Lawrence Barker Interests for a price per share to be determined by valuing the entire net worth of California at \$10,500,000, was designed to accomplish that objective. [R. 41-43.] The Hunter, Dulin & Co. agreement had to be abandoned because of the inability of the Lawrence Barker Interests to persuade the C. H. Barker Interests also to sell their California stock to Hunter, Dulin & Co., as the C. H. Barker Interests had previously verbally agreed to do. [R. 43-44.] Thereupon negotiations were immediately begun with Marshall Field, Gore, Ward & Co. (Bankers) to develop a plan which would enable the Lawrence Barker Interests to sell their interest in California and which at the same time would permit the C. H. Barker Interests to retain their interest in the business of that company. The agreements of December 20, 1923, by and between the Lawrence Barker Interests and the C. H. Barker Interests and Bankers, were entered into for the purpose of accomplishing that result. Such result was in fact accomplished by the plan adopted. The Lawrence Barker

Interests were relieved of all stockholders' liability for the debts of California, and were enabled to convert their common stock interest in California into cash from the disposition to Bankers of \$2,087,000 of Delaware First Preferred stock. The C. H. Barker Interests, who were not relieved of their stockholders' liability for the debts of California, were permitted to retain their common stock interest in the business of California by becoming common stockholders in Delaware, the company which succeeded to the business of California.

In view of the clear state of the record as to what the parties intended to, and did, accomplish, and in view of the judicial authorities previously cited, together with the stipulated fact that as part of the original plan the Lawrence Barker Interests were contractually obligated to, and did, transfer to Bankers the \$2,087,000 of Delaware First Preferred stock issued for their California stock (which Delaware stock comprised more than 20 per cent of Delaware's total stock), it is difficult to understand how the lower court could have concluded that the exchange by the California stockholders of their California stock for Delaware stock was a tax-free exchange within Section 112(b)(5). Perhaps the issues of the case were not as narrowly defined in the lower court, and this may have prompted the judge to state with respect to his study of the authorities cited in counsels' briefs that "To me it was like going through a terrible nightmare." [R. 138.]⁵

⁵The trial judge, in noting the relatively small amount of tax claimed for refund in the present proceeding, questioned the "expense and work devoted" by counsel to the case. [R. 136.] Obviously, however, since the ultimate decision herein will determine whether the Lawrence Barker Interests have a basis for their stock of \$4,387,000 or only \$1,326,081.86, the case justifies considerable expense and work.

As taxpayer has demonstrated herein, the transfer to Delaware by the California stockholders of their California stock for the issuance of \$9,569,700 of Delaware stock was not a tax-free exchange within Section 112(b)(5), for the reason that the Lawrence Barker Interests, as part of the originally adopted plan, were contractually obligated to, and did in fact, transfer to Bankers \$2,087,000 of Delaware First Preferred stock, thus leaving the California stockholders with less than 80 per cent of Delaware's stock after the transfer and, therefore, not in "control" of that company. Since the exchange by the California common stockholders of their California stock for Delaware stock was not a tax-free exchange within Section 112(b)(5), the basis to the Lawrence Barker Interests of the Delaware stock issued was the "cost" of that stock, *i. e.*, the fair market value, \$4,387,000, of the California stock given in exchange therefor. It necessarily follows that the basis of the 20,000 shares of Securities Company stock in the hands of the Lawrence Barker Interests is also \$4,387,000, or \$219.35 per share.

Conclusion.

The decision of the District Court is incorrect and should be reversed.

Respectfully submitted,

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March, 1951.

No. 12826.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Southern District of California

REPLY BRIEF FOR APPELLANT.

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No. 12826.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

(1)

The major portion of appellee's brief (Br. 14-19) is devoted to arguing that this case involves an exchange tax-free under Section 112(b)(3) of the Revenue Act of 1932 (and Sec. 202(c)(2) of the Revenue Act of 1921). Since the lower court refused so to hold, and taxpayer's opening brief was confined to the lower court's position, appellee's argument will be dealt with herein.

Section 112(b)(3) of the Revenue Act of 1932 provides that: "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

It is important to understand clearly "that a reorganization does not in itself defer any tax. There must be an *exchange* in pursuance of the reorganization." Paul,

Studies in Federal Taxation, 3d Series, p. 45. Section 112(b)(3) requires that the transferor in an exchange must receive *stock or securities in a corporation a party to the reorganization*. "Unless the consideration received was stock or securities in such a corporation, the non-recognition provisions do not apply, even though there is a reorganization." Mertens, *Law of Federal Income Taxation*, Vol. 3, p. 275. This requirement is commonly referred to as the test of "continuity of interest." The transferor must continue to retain a proprietary interest in the business by receipt of stock or securities of the corporation to which the business is transferred. (*Groman v. Commissioner*, 302 U. S. 82 (1937), reh. den. 302 U. S. 654 (1937).)¹

The courts have uniformly held that where various steps taken, and exchanges made, are parts of a single, common plan, the tax consequences are to be determined by viewing the transaction as a whole, rather than as individual and separate steps. (See, *e. g.*: *First Seattle Dexter Horton Nat. Bank, et al. v. Commissioner*, 77 F. 2d 45 (C. C. A. 9th, 1935); *Halliburton v. Commissioner*, 78 F. 2d 265 (C. C. A. 9th, 1935); *Schumacher Wall Board Corp.*

¹It goes almost without saying, of course, that if none of the transferors retains a proprietary interest in the transferred business, there is not even a reorganization, as defined in Section 112(g) of the Internal Revenue Code (Sec. 112(i) of the Revenue Act of 1932). If, on the other hand, a sufficient number of transferors retains a proprietary interest in the transferred business, there may be a reorganization, and the exchange as to such transferors to the extent of the retained proprietary interest may be tax free under Section 112(b)(3). However, to the extent that certain transferors do not retain a proprietary interest in the transferred business, *i.e.*, do not receive stock or securities in a corporation a party to the reorganization, the exchange by those transferors does not fall within the tax-free provisions of Section 112(b)(3). See *Groman v. Commissioner*, *supra*.

v. Commissioner, 93 F. 2d 79 (C. C. A. 9th, 1937); *Case v. Commissioner*, 103 F. 2d 283 (C. C. A. 9th, 1939).

In the instant case it is stipulated that the parties agreed to accomplish by the plan to reorganize California the final result that the Lawrence Barker Interests (including taxpayer), in place of their California shares, would own Securities Company (Lawrence Barker, Inc.) shares, whereas Delaware would own all the assets and business of California. [R. 51-56.] The agreement was carried out and the final result accomplished as set forth.

The type of triangular exchange here exemplified by the exchange of California stock for Lawrence Barker, Inc., stock has been considered in numerous cases. All of them hold that where a corporation (California) or its stockholders (Lawrence Barker Interests) end up owning stock in a corporation (Lawrence Barker, Inc.) which owns stock in another corporation (Delaware) which has received the assets, the exchange results in taxable gain or loss. (*Groman v. Commissioner*, *supra*; *Helvering v. Bashford*, 302 U. S. 454 (1938); *Hedden, et al. v. Commissioner*, 105 F. 2d 311 (C. C. A. 3d, 1939), cert. den. 308 U. S. 575 (1939), reh. den. 308 U. S. 636 (1939). See also: *Davis v. U. S.*, 26 Fed. Supp. 1007 (Ct. of Cl., 1939), cert. den. 308 U. S. 574 (1939); *Neidich v. Commissioner*, 38 B. T. A. 1178, aff'd *per curiam*, 105 F. 2d 1019 (C. C. A. 3d, 1939), cert. den. 308 U. S. 599 (1939); *Michigan Steel Corporation of New Jersey v. Commissioner*, 38 B. T. A. 435, app. dismissed 116 F. 2d 280 (C. C. A. 6th, 1940); *Lawrence v. Commissioner*, 123 F. 2d 555 (C. C. A. 7th, 1941).) These cases, all following the so-called *Groman-Bashford* doctrine, clearly establish the rule stated above. It can best be understood by referring to the facts of the *Groman* case: Glidden

organized an Ohio corporation, acquiring all its common stock. The shareholders of Indiana, including the taxpayer, transferred all their stock to Ohio in exchange for cash, preferred stock of Ohio, and prior preference stock of Glidden. Indiana was then dissolved and its assets distributed to Ohio. It was agreed that the Ohio preferred stock was stock of a "party to a reorganization" under Section 112(b)(3). As to the prior preference stock of Glidden, it was argued the same result should follow. The Supreme Court, however, held that the tax-free exchange provisions were designed to apply only where the proprietary interest of the stockholders in question continues to be represented *in the corporation to which the assets are transferred*. Glidden prior preference stock represented a proprietary interest in Glidden's assets, not a proprietary interest in Ohio, which had received the Indiana assets. Thus, receipt of Glidden stock could not be tax-free. The Supreme Court said (pp. 89-90):

"It is argued, however, that Ohio was the *alter ego* of Glidden; that in truth Glidden was the principal and Ohio its agent; that we should look at the realities of the situation, disregard the corporate entity of Ohio, and treat it as Glidden. But to do so would be to ignore the purpose of the reorganization sections of the statute, which, as we have said, is that where, *pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss*. If cash or 'other property'—that is, property other than stock or securities of the reorganized corporations—is received, present gain or loss must be recognized. * * *

Was it [Glidden prior preference stock] not 'other

property' in the sense that *qua* that stock the shareholders of Indiana assumed a relation toward the conveyed assets not measured by a continued substantial interest in those assets in the ownership of Ohio, but an interest in the assets of Glidden a part of which was the common stock of Ohio? These questions we think must be answered in the affirmative." (Italics supplied.)

The cases, without exception, hold that where as part of a contemplated plan a corporation, whose assets have been transferred (or its stockholders), receive stock in a corporation *other than the corporation to which the transferred assets are* finally conveyed, the stock received is not acquired tax-free within the provisions of Section 112(b) (3). The net result of the entire transaction controls the tax consequences, even though each step in the plan, if considered separately, would alone constitute a tax-free exchange.

In *Hedden et al. v. Commissioner, supra*, Bethlehem Steel had the right to acquire the assets of the Hedden Company, but directed that they be transferred to Union Company and McClintic-Marshall Company, both wholly owned Bethlehem-subidiaries, in exchange for which Hedden received Bethlehem bonds and some cash. After reviewing the *Groman* case and refusing to accept the argument that the transfer of the Hedden assets to Bethlehem's nominees was the same as a transfer of those assets to Bethlehem, the Court declared:

"In the instant case after the transfer Union and McClintic had Hedden's assets but the latter no longer had an equivalent continuing interest in the assets, for what it obtained in exchange were not securities in Union and McClintic, but in Bethlehem, a company whose corporate existence was separate and distinct

from that of its subsidiaries. The fact that Union and McClintic were wholly owned subsidiaries of Bethlehem is, as we have seen, immaterial since they were separate corporations with distinct assets and liabilities whose existence we are not authorized by the Revenue Act to ignore."

In *Anheuser-Busch, Inc., et al. v. Commissioner*, 40 B. T. A. 1100 (1939), aff'd, 115 F. 2d 662 (C. C. A. 8th, 1940), cert. den. 312 U. S. 699 (1941), Anheuser-Busch, which owned all the stock of Melrose (New York), on August 26, 1930, entered into an agreement with Borden under the terms of which the properties of Melrose (New York) were to be transferred to Borden in exchange for the issuance to Anheuser-Busch of 35,000 shares of Borden stock. In September 1930, Borden organized a Delaware corporation (Delaware) and agreed to turn over to Delaware, in consideration for the issuance of all Delaware's stock, the properties of Melrose (New York) which Borden was to acquire. The above agreements were carried out, and on September 26, 1930, the Melrose (New York) properties were conveyed to Borden in exchange for the issuance to Anheuser-Busch of 35,000 Borden shares. On the same day, Borden conveyed those properties to Delaware, in exchange for all of Delaware's stock. It was found as a fact that Anheuser-Busch was in no way consulted as to the desirability or advisability of the organization of Delaware by Borden to take over the Melrose (New York) properties; and that Anheuser-Busch had no direct interest in the disposition of the Melrose (New York) assets by Borden after such assets had been transferred to Borden.

It was argued that the tax consequences should be determined by considering each step in the above transactions separately; that the stock of Borden received by the tax-

payer was received in a tax-free exchange in connection with a reorganization, since such had been issued in exchange for substantially all the properties of Melrose (New York) which had been transferred directly to Borden; that the second step in the transaction, whereby Borden conveyed those properties to Delaware, its wholly-owned subsidiary, considered as a separate transaction, was also a tax-free exchange under Section 112(b)(5), and should not be deemed to destroy the non-recognition of gain on the transaction since the agreement embodying the plan did not specifically require the organization of or transfer to Delaware, but made it wholly optional with Borden. The Board, although conceding that the transaction would have constituted a tax-free exchange if each step in the transaction were considered separately, held that since it was a contemplated possibility, under the plan which actually eventuated, that the property received by Borden would be transferred to its wholly-owned subsidiary, the tax consequences of the various steps were to be determined by viewing the transaction as a whole. Since at the completion of the transaction Anheuser-Busch owned stock in Borden, it no longer had a continuing proprietary interest in the Melrose (New York) properties which were owned by Delaware and thus the exchange of its Melrose stock for Borden stock was not a tax-free exchange. Said the Board (pp. 1106-1107):

“In each of these cases the transfer was actually made to a subsidiary nominee of the parent. There was no provision of the plan which required the participation of the subsidiary. In each case it was the privilege of the parent, the party to the contract of reorganization, to determine whether it or its subsidiary would receive the transferred property. In

each case we may assume that, if the parent itself had elected to receive and hold the property, the rule of the *Groman* and *Bashford* cases would have been inapplicable. In each case, however, the parent chose to avail itself of the optional provision and to have the property conveyed to its subsidiary. The transferor in those cases was not entitled to be consulted, and for all that appears was not. *The conclusion to be gathered from these decisions is therefore that the intervention of a subsidiary will be treated as a part of the plan, if it is a contemplated possibility under the plan and actually eventuates.*

* * * * *

“It is true petitioner had no voice in the decision that the property was to be received and held by Delaware rather than by Borden. Neither did those contracting on behalf of the transferors in the *Mellon* and *Hedden* cases. It may also be true that through the exercise of volition by a third person petitioner and Melrose were placed in the position of having entered into a taxable transaction in lieu of one that would have been tax-free. But that is no more than to say that by their own act they put it within the power of another so to control the essential character of that transaction that the taxing provisions of the revenue act became operative. That is no justification for concluding that they did not become operative, nor for relieving petitioner and Melrose of the tax consequences of the transaction which actually eventuated. To hold otherwise would be tantamount to applying the tax law on the basis of what was hoped for rather than what occurred.” (*Italics supplied.*)

See, also: *Edith G. Goldwasser v. Commissioner*, 47 B. T. A. 445 (1942), *aff'd per curiam* 142 F. 2d 556 (C. C. A. 2d, 1944), *cert. den.* 323 U. S. 765 (1944).

Another group of cases is different with respect to the type of transfers involved, but identical in net result with the cases previously discussed herein. These cases involve a situation where pursuant to a plan, the business property of a corporation is conveyed to "A" corporation, in exchange for the issuance, to the transferring corporation or its stockholders, of stock in "A" corporation, which stock the recipient then exchanges for stock in "B" corporation. The net result of such transfers is, of course, identical with that of the cases previously discussed herein, namely, that the transferor ends up owning stock in "B" corporation, while the transferred properties come to rest in "A" corporation. Again, despite the variation in the form of transaction, the courts, *considering only the ultimate result thereof*, have consistently applied the *Groman* rule and held that since the transferor ends up owning stock in a corporation other than the corporation which ultimately receives the transferred business property, the stock received by the transferor does not represent a continuing proprietary interest in the transferred assets, and may therefore not be received tax free.

In *United Light & Power Co. v. Commissioner*, 38 B. T. A. 477, aff'd 105 F. 2d 866 (C. C. A. 7th, 1939), cert. den. 308 U. S. 574 (1939), several similar sets of transactions were entered into, one of which comprised the transfer by United Light & Railways Company (Railways) of part of its property to the Dexter Company, a new corporation, in exchange for all the stock of Dexter. Railways then transferred all the Dexter stock to the American Light & Traction Company (American) in exchange for stock of that company.

The taxpayer argued that the transfer by Railways to Dexter in exchange for all Dexter's stock, was a separate

complete transaction, which constituted a tax-free exchange, a transfer of part of the assets of a corporation in exchange for control of the transferee. It further contended that the transfer by Railways of all the Dexter stock to American in exchange for American stock, was another separate, complete transaction, which also constituted a tax-free exchange pursuant to a reorganization, *i. e.*, the acquisition by one corporation (American) of at least a majority of the stock of another corporation (Dexter) in return for a consideration representing a continuity of interest (stock of American). The Board recognized that if the tax consequences of the two exchanges were to be determined by considering each exchange separately, the taxpayer would prevail. It was held, however, by both the Board and the Circuit Court of Appeals, that the tax consequences could not be so determined, rather, as contended by the Government, "the two transfers * * * were three-way exchanges, pursuant to a single plan." Viewing the transaction as a whole, therefore, since the net result was that the consideration finally acquired by Railways in place of its original property was stock of American, while the transferred property itself was owned by Dexter, it was held that the transaction did not constitute a tax-free exchange.

The same result was reached in *Commissioner v. First National Bank v. Altoona, et al.*, 104 F. 2d 865 (C. C. A. 3d, 1939), cert. dismissed 309 U. S. 691 (1940), and *Whitney Corp., et al. v. Commissioner*, 38 B. T. A. 224 (1938), aff'd 105 F. 2d 438 (C. C. A. 8th, 1939), where again each of two transfers, if considered independently, would have resulted in a tax-free exchange.

Because the determination of the status of a particular exchange as tax-free or taxable also controls the question of the basis for gain or loss to be used by the taxpayer

upon a subsequent disposition of his newly acquired stock, Randolph E. Paul, eminent authority on tax law, predicted in 1940 that Government victories in the *Groman* type of case "may be boomerangs" where the question involved is, as in the instant case, the taxpayer's basis for gain or loss. *Paul, Studies in Federal Taxation*, Third Series (1940), p. 121. The accuracy of Mr. Paul's prophesy has been amply demonstrated.

In *Illinois Water Service Co. v. Commissioner*, 2 T. C. 1200 (1943) (Acq. 1944 C. B., p. 15), Foshay Co., after becoming the sole stockholder of the Freeport Water Co., in 1936, caused the Freeport properties to be transferred to another corporation, Peoples Illinois, in exchange for which Foshay received all the stock of Peoples Illinois. Instead of retaining the Peoples Illinois stock, however, Foshay transferred it to its controlled corporation, Peoples, in exchange for Peoples stock. The Commissioner contended that the transfer of the Freeport properties to Peoples Illinois constituted a tax-free exchange and that the basis of the Freeport properties in the hands of Peoples Illinois was thus the same basis as such properties had in the hands of Freeport. The Court held, however, that Peoples Illinois did not receive the Freeport property pursuant to a tax-free exchange (p. 1234), and that the basis to Peoples Illinois of the Freeport property was the fair market value on November 15, 1926, of its stock which it had issued for such property. Although Foshay had originally acquired the stock of the corporation (Peoples Illinois) to which the Freeport property had been transferred, the temporary ownership of that stock by Foshay was too transitory to supply the required continuity of interest in the Freeport property. By immediately exchanging the Peoples Illinois stock for stock of Peoples, Foshay destroyed the requisite continuity of inter-

est, since it then held stock in a corporation (Peoples) other than the corporation in which the Freeport properties ultimately vested (Peoples Illinois).

See, also: *Rotenberg v. Sheehan, et al.*, 48 Fed. Supp. 584 (E. D. Mo. 1943), Govt's app. dismissed, C. C. A. 8th, September 11, 1944.

Appellee admits, as it must, that there can be no tax-free exchange within Section 112(b)(3) where a stockholder receives "stock in some corporation other than the corporation to which the transferred assets were ultimately conveyed." (Br. 17.) Nor can appellee deny, in view of the uncontradicted state of the record, that the plan adopted in 1923 for the reorganization of California provided that at the completion thereof the Lawrence Barker Interests, in place of their California stock, would own stock in Lawrence Barker, Inc., that Delaware would own the business and assets of California, and that the Lawrence Barker Interests would own no stock in Delaware, and that such was the actual result of the plan as consummated. [R. 51-56.] Appellee's argument herein is clear. Its position is that the exchange by the California stockholders (including taxpayer) of their California stock for Delaware was one tax-free exchange under Section 112(b)(3) of the Revenue Act of 1932 and Section 202(c)(2) of the Revenue Act of 1921; and that the exchange by the Lawrence Barker Interests of their Delaware stock for Lawrence Barker, Inc., stock was another tax-free exchange under Section 112(b)(5) of the Revenue Act of 1932 and Section 202(c)(3) of the Revenue Act of 1921. The fundamental fallacy in appellee's argument, of course, is its attempt to determine the tax consequences of the 1923 exchanges by considering the tax consequences of each step separately. This is precisely

the reasoning which every court, without exception, has rejected.

See, *e. g.*: *United Light & Power Co. v. Commissioner, supra*; *Anheuser-Busch, Inc., et al. v. Commissioner, supra*, and other cases cited herein.

Appellee admits that here the reorganization “plan was full and complete [R. 51-56].” (Br. 16.) It neglects to point out, however, that the formation of Lawrence Barker, Inc., was not only “a contemplated possibility under the plan [which] actually eventuate[d].” (See *Anheuser-Busch, Inc., et al. v. Commissioner, supra.*) but *in fact the entire set of agreements and the plan*, all of which were entered into by the C. H. Barker Interests, the Lawrence Barker Interests, and Bankers, *specifically provided that Lawrence Barker, Inc., would be formed, that it would receive the Delaware stock, and that the Lawrence Barker Interests would receive only Lawrence Barker, Inc., stock in place of the California stock which they had originally owned.* [R. 51-56.] Moreover, to state, as does appellee, that “the creation of Lawrence Barker, Inc., served only the individual purposes of the * * * Lawrence Barker Interests” and that its function “could as well have been performed whether it had been incorporated or not” (Br. 18-19), is not only to ignore the stipulated facts, but even if true would be completely immaterial. (See, *Anheuser-Busch, Inc., et al., v. Commissioner, supra.*)

The appellee pays lip service to the uncontrovertible legal proposition that Lawrence Barker, Inc., cannot be treated as “the *alter ego* of the Lawrence Barker Interests” (Br. 18) and that it cannot “ignore [the] corporate entity” of Lawrence Barker, Inc. (Br. 18.) In the same breath, however, it declares that to sustain the tax-

payer's position here "would * * * ignore the intra-identity of Lawrence Barker, Inc., and the individuals comprising the Lawrence Barker Interests" (Br. 17); thus "recognition of Lawrence Barker, Inc., as the effective owner of stock in Delaware perverts the substance of the 1923 transactions * * *". (Br. 21.)

Appellee recognizes that it can "not contend in this respect that Lawrence Barker, Inc., was a party to the reorganization." (Br. 16.) It asserts that "such a contention is not necessary to the application of Section 112(b)(3)." (Br. 16.) But since the corporate existence of Lawrence Barker, Inc., cannot be ignored, and since it must be acknowledged that its formation was a part of the plan agreed to by all of the interested parties for the reorganization of California, and since in accordance with that plan its stock was the stock finally received by taxpayer in exchange for his California stock, it necessarily follows that because Lawrence Barker, Inc., is not "a party to the reorganization," the receipt of its stock in place of California stock cannot be a tax-free exchange under Section 112(b)(3).

Although in its brief below appellee stated "The defendant makes no contention that the stockholders of Lawrence Barker, Inc., as such, acquired any direct proprietary interest in the assets and business of the California corporation" which were transferred to Delaware, it here asserts that there is "clear continuity * * * of interest" (Br. 17), presumably because Lawrence Barker, Inc.'s "only function is to hold securities." (Br. 18.) Apart from the fact that Lawrence Barker, Inc., has remained in existence for more than 25 years, paying taxes upon its income, and its shareholders doing likewise with respect to dividends received therefrom, appellee's statement is refuted by every case cited herein.

In its attempt to distinguish the *Groman* line of cases, appellee asserts "Where a stockholder holds stock in the parent of a wholly-owned subsidiary, his control of the subsidiary is admittedly indirect and elusive, and it may be convincingly argued that there is no continuity of interest between the individual and the subsidiary." (Br. 17.) In short, appellee concedes that if Lawrence Barker, Inc., had been the parent of Delaware, its wholly-owned subsidiary, there would be no continuity of interest between the stockholders of Lawrence Barker, Inc., and Delaware; but since in the instant case Lawrence Barker, Inc., owned only a *portion* of Delaware's stock, appellee concludes that the stockholders of Lawrence Barker, Inc., therefore had a direct continuity of interest in Delaware. Appellee's attempt thus to distinguish the *Groman* line of cases simply highlights the fact that as a result of those cases the present case *a fortiori* involves a taxable exchange. Obviously, if the receipt by the transferor of property, of stock in a parent corporation whose wholly-owned subsidiary has received the transferor's property, does not give the transferor a continuing proprietary interest in the transferred property, certainly the receipt by the transferor of stock in a corporation (Lawrence Barker, Inc.) which merely owns *some* stock in the corporation (Delaware) which has received the transferred property, cannot afford the transferor a continuing proprietary interest in the transferred property.

Nevertheless, appellee urges that the doctrine enunciated in the *Groman* case and related cases, should not be applied to the instant case. It declares simply that to apply the principle established by those cases (a principle established at the Government's behest, incidentally) "is to take too superficial a view of what really happened in

1923 and 1924 herein.” (Br. 18.) Appellee is, however, unable to cite a single case in affirmative support of its position. Its inability, of course, stems from the fact that in every recorded case after the *Groman* decision the courts have held that a stockholder engages in a tax-~~free~~^{FREE} exchange where as part of a plan his corporation transfers its assets to another corporation and the stockholder receives stock in a corporation other than the corporation to which the transferred assets are conveyed. It is because of the foregoing that appellee sees fit to admit that to hold taxpayer herein engaged in a tax-free exchange would present “an apparent conflict with the * * * *Groman* and *Bashford* line of decisions.” (Br. 21.)

(2)

The lower court determined the tax consequences of the 1923 exchange whereby the Lawrence Barker Interests transferred their California stock and received in its place stock of Lawrence Barker, Inc., by attempting to assess the tax consequences of the two exchanges separately. It concluded that the first transaction whereby all the common stockholders of California exchanged their stock for Delaware stock was a tax-free exchange within Section 112(b)(5). If such conclusion were correct (and taxpayer has shown in its opening brief why he feels it was not, since the transferors were not in “control” of Delaware after the exchange), the basis to the taxpayer of his California stock would, of course, be carried over to the Delaware stock issued for the California stock. If the second transfer by the Lawrence Barker Interests of the Delaware stock to Lawrence Barker, Inc., in exchange for Lawrence Barker, Inc., stock were considered a separate transaction which was never contemplated as part of the original plan, the basis of the Lawrence Barker, Inc.,

stock in the hands of the taxpayer would be the same as the Delaware stock. Taxpayer has never contended to the contrary. (Br. 20, 32.) Since the lower court chose to predicate its decision upon the ground that the first exchange in 1923 should be treated as a separate transaction whereby all the California stockholders exchanged their California stock for Delaware stock and that such exchange qualified as a 112(b)(5) exchange, taxpayer in his opening brief felt it only necessary to point out that such conclusion is erroneous, because of the pre-existing obligation on the part of the Lawrence Barker Interests, pursuant to the plan, to transfer more than 20% of the Delaware stock to Bankers. Obviously, if the exchange by all the California stockholders of their California stock for Delaware stock, was not a tax-free exchange, it is uncontroverted that the basis of the Delaware stock in the hands of Lawrence Barker Interests (including taxpayer) would be the cost of that stock, *i. e.*, the fair market value of \$4,387,000 of the California stock given in exchange therefor. Since this is true, the fact that the exchange by the Lawrence Barker Interests of their Delaware stock for Lawrence Barker, Inc., stock, if considered as a separate transaction which was never contemplated as part of the original plan, might, as appellee urges (Br. 12-13, 19-20), qualify under Section 112(b)-(5), is wholly immaterial. Even so, the Lawrence Barker, Inc., stock in the hands of the Lawrence Barker Interests would also take a basis of \$4,387,000. Thus the lower court is in error not only in treating the 1923 exchanges as separate independent transactions not originally contemplated under the plan as adopted, but even if it were proper so to determine the tax consequences, the court still erred in holding that after the first exchange by all the common stockholders of California for Dela-

ware stock, such transferors were in "control" of Delaware within the meaning of Section 112(b)(5).

Appellee endeavors to support the lower court's conclusion that the transfer by all the California stockholders of their stock for Delaware stock, considered as a separate transaction, was a tax-free exchange under Section 112-(b)(5) by asserting that the obligation of the Lawrence Barker Interests to transfer \$2,087,000 (20,870) shares of the Delaware stock to Bankers was not a part of the plan originally agreed to by the Lawrence Barker Interests, the C. H. Barker Interests and Bankers; that it was an obligation "independent of and foreign to" such plan, in "no way connected" therewith, and "must be considered a part of another transaction." (Br. 23, 21-22.) We prefer to stand on the record. The stipulated facts show that the original agreement between the Lawrence Barker Interests and the C. H. Barker Interests specifically provided for the participation of Bankers (in precisely the fashion that Bankers did in fact participate), *i. e.*, that Bankers would acquire \$1,087,000 of Delaware stock, would have an option to buy another 1,000,000 of such stock and would also buy the remaining \$413,000 of Delaware First Preferred stock from Delaware in order to provide funds to retire the outstanding preferred stock of California. [R. 45, 51-56.] At the same time Bankers entered into binding agreement with the C. H. Barker Interests and the Lawrence Barker Interests to perform those functions [R. 57-64], which agreement it fulfilled in every detail. Clearly without the participation of Bankers the plan could never have been adopted or consummated. But perhaps the best answer to this argument by appellee is to quote from its own brief (Br. 5):

"This agreement adopted a plan of reorganization. [R. 51-56.] * * * *It* [the plan] *also*

contemplated the sale to Marshall Field, Glorc, Ward & Company (hereinafter referred to as Bankers) of certain stock in Barker Delaware, and the granting of an option to Bankers to purchase further Barker Delaware stock. [R. 55-56.]" (Italics supplied.)

Appellee also argues that "there was an obligation to sell only 10,870 shares to Bankers" (Br. 23); that the option granted to Bankers to purchase an additional 10,000 shares was "nothing more than a continuing offer to sell," and that until accepted, no contract existed. (Br. 23.) But it is fundamental law that "if consideration is paid for an offer, the offer is a contract. Such contracts are generally called options." (*Williston on Contracts*, Vol. I, Sec. 61, p. 106 (1926 Ed.).) "The word 'option' is often used for any continuing offer regardless of whether it is revocable for lack of consideration; but more commonly the word is used to denote an offer that is irrevocable and therefore a contract." (*Restatement of the Law of Contracts*, Sec. 24, p. 301.) Here, as part of the original plan, Bankers bound themselves to purchase 10,870 shares of Delaware stock; also to purchase another \$413,000 of Delaware stock in order to provide Delaware with the funds to redeem the outstanding preferred stock of California. In consideration of those promises Bankers were given an option, which it exercised, to purchase the remaining \$10,000 shares of Delaware stock. [R. 24, 45-56.] To argue that the Lawrence Barker Interests were not obligated to sell to Bankers the additional 10,000 shares of Delaware is to ignore completely both the stipulated facts and basic principles of contract law. The point is well exemplified in *National Rubber Machinery Company v. United States*, discussed on pages 28 and 29 of taxpayer's opening brief.

Commissioner v. First National Bank of Altoona, et al., 104 Fed. Sec. 865 (C. C. A. 3rd, 1939), cited by appellee (Br. 23), was in no way concerned with Section 112(b)-(5). The existence of an option therein (which apparently was never exercised) was entirely immaterial to the issues presented. In fact, the case involved only the question of the application of the *Groman* doctrine. Since the transferor in that case did not end up owning stock in corporation to which the assets had been transferred, the decision of the Board of Tax Appeals holding there was a tax-free exchange, was reversed by the Circuit Court on the authority of the intervening decision in the *Groman* case.

Respectfully submitted,

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May, 1951.

No. 12826
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
for the Southern District of California.

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No. 12826
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 140-146] are unreported. The separate memorandum opinion of the District Court [R. 136-138] is unreported.

Jurisdiction.

This appeal involves federal income and victory taxes for the taxable year 1943. The taxes in question were paid on or before March 15, 1944. [R. 144.] Claim for refund was filed March 15, 1947 [R. 9-16], and the Commissioner of Internal Revenue rejected this claim July 27, 1948. [R. 17.] Within the time provided in Section 3772 of the Internal Revenue Code and on April 27, 1949, taxpayer brought an action in the District Court for recovery of a portion of the taxes paid. [R. 3-8.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The judgment was entered October 24, 1950. [R. 146-147.] Within sixty days and on December 18, 1950, a notice of appeal was filed. [R. 148.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Questions Presented.

1. Whether the transactions whereby taxpayer exchanged shares of common stock in Barker Bros., Inc., of California, which he originally owned, for common stock in Barker Bros., Inc., of Delaware and then exchanged his common stock in the latter corporation, or his right to receive that common stock for common stock in Lawrence Barker, Incorporated, gave rise to a gain or loss that may be recognized for federal income tax purposes within the meaning of Sections 112(b)(5) and 113(a)(6) of the Internal Revenue Code.

2. Following from question number (1), whether certain shares in Lawrence Barker, Incorporated, subsequently sold by taxpayer, had a cost or other basis for determining gain or loss upon their disposition.

Statutes and Regulations Involved.

These appear in the Appendix, *infra*.

Statement.

The facts were found as follows by the District Court [R. 141-144]:

Lawrence Barker, the taxpayer herein, and Charles Lawrence Barker, C. Lawrence Barker and C. L. Barker are one and the same person. [R. 141.]

On October 19, 1923, and up to and including December 28, 1923, Barker Bros., Inc., was a California corporation, engaged in the business of selling furniture and house furnishings. Its outstanding capital stock consisted of 5,750 shares of voting preferred stock, having a total par value of \$575,000, and 17,894.35 shares of common stock, having a total par value of \$1,789,435. [R. 141.]

On October 19, 1923, and up to and including December 28, 1923, the common stock of Barker Bros., Inc. of California was owned as follows [R. 142]:

Stockholder	No. of Shares
Charles Lawrence Barker, as Executor of the Estate of W. A. Barker, deceased.....	3,418.19
Pauline Barker	1,660
Lawrence Barker, individually.....	1,841.50
F. K. Colby, Trustee.....	300
Lawrence Barker, Trustee.....	960
C. H. Barker)	
C. A. Barker)	8,187.69
Erle P. Barker)	
J. W. Beam, Trustee for certain employees of Barker California	1,526.97
Total	17,894.35

Prior to December 28, 1923, the cost or other basis for determining gain or loss on the sale or disposition of the shares of stock of Barker Bros., Inc. of California in the hands of the following stockholders of Lawrence Barker, Inc., was [R. 142]:

Stockholder	No. of Shares	Basis
Estate of W. A. Barker.....	3,368.19	\$753,598.84
Estate of W. A. Barker.....	50	9,239.85
Pauline Barker	1,660	163,577.19
Lawrence Barker	1,841.50	235,031.57
Pauline Barker	1,660	163,577.19
Lawrence Barker	1,841.50	235,031.57
Lawrence Barker, Trustee.....	960	126,345.26
F. K. Colby, Trustee.....	300	38,289.15

On December 28, 1923, a corporation was organized under the laws of Delaware and also known as Barker Bros., Inc. [R. 143.]

On December 28, 1923, the holders of all the common stock of Barker Bros., Inc. of California agreed to and did exchange all of the shares of its common stock for all of the shares of the common stock of the newly organized corporation (Barker Bros., Inc. of Delaware), and were in control of the latter corporation immediately following the exchange with the same proportionate stock interests that they had previously held in the California corporation. [R. 143.]

On December 22, 1923, a corporation known as Lawrence Barker, Incorporated, had been organized under the laws of the State of California by the taxpayer and a group of the holders of common stock in Barker Bros., Inc. of California, who had associated themselves with him. The persons in this group directed that the shares of common stock in Barker Bros., Inc. of Delaware, to which they were entitled, be issued not in their names but in the name of Lawrence Barker, Incorporated. This direction was carried out and Lawrence Barker, Incorporated, received the shares of common stock in Barker Bros., Inc. of Delaware, to which taxpayer and his associates were entitled in exchange for all of its own common stock which was, on December 28, 1923, issued to taxpayer and his associates in the same proportions that they were entitled to receive stock in Barker Bros., Inc. of Delaware. Taxpayer and his associates were in control of Lawrence Barker, Incorporated, immediately after this exchange. [R. 143-144.]

On December 30, 1943, taxpayer sold thirty shares of the common stock of Lawrence Barker, Inc., which

he had acquired by the exchange set out above in Finding No. VII for the sum of \$5,000. [R. 144.]

On March 15, 1944, taxpayer filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue for the Sixth Collection District of California and paid to such Collector on or before March 15, 1944, the entire tax liability shown on return. The taxpayer included in his 1943 tax return as income from capital gain the entire amount of \$5,000 received by him as the sales price of his thirty shares of the common stock of Lawrence Barker, Inc., as previously mentioned herein. [R. 144.]

Additional facts were stipulated. [R. 21-134.] To give a more complete picture than that found in the District Court's findings of fact, the following merit notice:

The transactions involved herein resulted from an agreement to reorganize the corporate affairs of Barker California. [R. 45-56.] This agreement adopted a plan of reorganization. [R. 51-56.] As found by the District Court, the plan contemplated the exchange of stock in Barker California for Barker Delaware stock. It also contemplated the sale to Marshall Field, Gloré, Ward & Company (hereinafter referred to as Bankers) of certain stock in Barker Delaware, and the granting of an option to Bankers to purchase further Barker Delaware stock. [R. 55-56.]

In pursuance of the plan, 50,892 shares of Barker Delaware stock were issued to the majority stockholders of Barker California, in the same proportion as they held

stock in California, in exchange for their Barker California common stock. [R. 26.] The Lawrence Barker interests transferred their Barker California stock to Barker Delaware and, pursuant to a letter so directing, their proportionate interest in Barker Delaware (43,870 shares) was transferred to Lawrence Barker, Inc. The Beam interests similarly received 935 shares of Barker Delaware. [R. 27.] In return for their having caused the transfer of Barker Delaware stock to Lawrence Barker, Inc., the Lawrence Barker interests received 19,997 shares of stock in Lawrence Barker, Inc. [R. 27-28, 85-86.]

As the reorganization plan contemplated [R. 53-55], the common stock holdings of Lawrence Barker, Inc., were transformed into holdings of 20,870 shares of Barker Delaware first preferred and 23,000 shares of second preferred. [R. 29.] The common stock holdings of the C. H. Barker interests were transformed into 100,000 shares of no par common stock. The preferred stock of Barker California was redeemed and returned and the assets of that company transferred to Barker Delaware. [R. 33-34.]

Of the 20,870 shares of Barker Delaware first preferred now held by Lawrence Barker, Inc., the latter corporation was obligated to transfer 10,870 shares to Bankers. [R. 58.] This was done [R. 30], leaving 10,000 shares of Barker Delaware first preferred in the hands of Lawrence Barker, Inc. The reorganization agreement contemplated [R. 46] that the Lawrence Barker interests might sell these remaining 10,000 shares to Bankers. Accordingly, the agreement with Bankers gave Bankers an option to purchase these shares at a stated price. [R. 58.] This option was exercised. [R. 30-32.]

Summary of Argument.

Under the applicable law, the Revenue Act of 1921, the shares of stock in Lawrence Barker, Inc., sold in 1943 by taxpayer, took their basis from taxpayer's Barker Delaware stock, in exchange for which he had received the Lawrence Barker, Inc., stock, and which in turn took its basis from taxpayer's Barker California stock.

Taxpayer acquired his Lawrence Barker, Inc., stock as a result of a tax-free exchange, since he received it in exchange for Barker Delaware stock, receiving the same proportionate interest in property received as he had had in the property transferred, and since he and his co-transferors of Barker Delaware stock controlled Lawrence Barker, Inc., immediately after the transfer.

Taxpayer acquired his Barker Delaware stock in a tax-free exchange for his stock in Barker California. Both Barker Delaware and Barker California were parties to a reorganization, and within the requirement of the statute, there was a plan of reorganization. At the completion of the plan, Barker Delaware owned all the assets formerly owned by Barker California. The former majority stockholders of Barker California became the majority stockholders in Barker Delaware. There had been, within the terms of the statute, the acquisition by one corporation of all the stock and all the assets of another corporation, and hence a complete compliance with the definition of a reorganization contained in the statute. The continuing majority stock interest of the majority stockholders provides the requisite continuity of interest. The creation of Lawrence Barker, Inc., to hold the Barker Delaware stock of the Lawrence Barker interests does not change the tax-free character of the exchange of Barker California for Barker Delaware stock. This case is to be distinguished from those in which assets are transferred to a subsidiary

and the original transferors receive stock in the parent, or where stock is transferred to the parent and they receive stock in a subsidiary. The presence of Lawrence Barker, Inc., is not comparable to such situations because of the obvious continuity if not identity of interest between the Lawrence Barker interests and Lawrence Barker, Inc. Thus, it is unimportant that Lawrence Barker, Inc., is not to be described as a party to the reorganization. Moreover, the reorganization scheme in no way required the participation of Lawrence Barker, Inc.; its creation was important only to the purposes of the several individuals composing the Lawrence Barker interests.

In the alternative, taxpayer acquired his stock in Lawrence Barker, Inc., in a tax-free organization, because the stock was acquired as the result of a transfer to a corporation for its stock, after which the original transferors controlled the corporation. The stockholders of Barker California transferred property to Barker Delaware, and received in Barker Delaware controlling stock within the definition of the statute in the same proportion as their interests in the property transferred to it. The Lawrence Barker interests merely chose to hold their stock through the medium of Lawrence Barker, Inc. The obligation of the Lawrence Barker interests to transfer stock in Barker Delaware to Bankers does not affect this transfer, for this was merely a step in the liquidation of the Lawrence Barker interests' holdings, unrelated to the reorganization of Barker California. Thus, the presence of such obligations does not affect the control by the former California stockholders of Barker Delaware immediately after their transfer of California stock to it. In any event, only a fraction of the Barker Delaware stock sold to Bankers was included in the obligation; other shares were included in an option agreement. And an option agreement is not a binding contract to sell; therefore it cannot be considered to affect control.

ARGUMENT.

The Taxpayer's Shares in Lawrence Barker, Inc., Which He Sold in 1943, Take Their Basis From Shares in Barker Delaware Which He Transferred to Lawrence Barker, Inc., in Exchange for Shares Therein.

In 1943 taxpayer sold thirty shares of the stock of Lawrence Barker, Inc., and this case presents the issue as to taxpayer's basis for computing gain or loss on that sale. This stock he had received in 1923, in exchange for directing the transfer to Lawrence Barker, Inc., of stock in Barker Delaware. He had become entitled to the Barker Delaware stock by virtue of transferring to that corporation his portion of the stock of Barker California, which was the predecessor corporation to Barker Delaware. That the shares received by taxpayer from Lawrence Barker, Inc., were received in an exchange upon which no gain or loss should be recognized cannot seriously be questioned, and hence the basis of these shares is the same as the basis of the property exchanged for them. The substantial question in the case therefore is, as we shall show, whether the Barker Delaware stock (exchanged for the Lawrence Barker, Inc., stock) was acquired by the taxpayer in a non-taxable exchange.

Under Section 113(a) of the Internal Revenue Code (Appendix, *infra*), for determining gain or loss the basis of property is to be considered the cost of that property. But there are exceptions to this general statutory rule. For example, Section 113(a)(6) of the Code provides that if property is acquired in an exchange upon which, under Section 112(b) no gain or loss is recognized, the basis of the property sold shall be the same as the basis of the property originally exchanged for it. Prior Revenue Acts

have contained similar provisions. For purposes of this case, the relevant sections are to be ascertained by reference to Section 113(a)(12) and (16) of the Code. (Appendix, *infra*.)

Section 113(a)(12) provides in the case of property acquired after February 28, 1913, in any taxable year beginning prior to January 1, 1934, where the basis thereof for purposes of the Revenue Act of 1932 was prescribed by Section 113(a)(6) (Appendix, *infra*), (7), or (9) of that Act, then the basis shall be the basis therein prescribed in the Revenue Act of 1932. Section 113(a)(16) provides in the case of similar property, acquired in any taxable year prior to January 1, 1936, where the basis for the purposes of the Revenue Act of 1934 was prescribed by Section 113(a)(6) (Appendix, *infra*), (7), or (8) of such Act, then the basis shall be the basis therein prescribed in the Revenue Act of 1934.¹

Section 113(a)(6) of both the 1932 and 1934 Acts provides that where property is acquired upon exchanges described in Section 112(b) of such Acts (Appendix, *infra*), the basis of the property acquired shall be the same as the basis of the property exchanged, decreased in the amount of any money received by taxpayer and increased in the amount of gain or decreased in the amount of loss to such taxpayer that was recognized upon such an exchange under the law applicable to the year in which the exchange was made. Thus we are concerned herein primarily with Section 202(c)(2) and (3) of the Revenue Act of 1921,

¹The seemingly conflicting provisions of Section 113(a)(12) and (16) are explained by the fact that the Revenue Act of 1934 made changes with respect to certain kinds of reorganizations. As a result, pre-1934 reorganizations are examined in the light of the law prior to the 1934 changes. See 3 Mertens, Law of Federal Income Taxation, Sec. 21.80.

which was in effect in 1923 when the events herein took place, which contained, so far as material here, substantially the same provisions as Section 112(b) of the Revenue Act of 1934 referred to by the District Court, and Section 112(b) of the Revenue Act of 1932 referred to by the taxpayer. (Br. 19.)

Section 202(c)(2) of the Revenue Act of 1921 (Appendix, *infra*), provides that no gain or loss shall be recognized when in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. It defines a reorganization as including (1) a merger or consolidation, including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation, (2) a recapitalization, or (3) a mere change in identity, form, or place of organization of a corporation. Section 202(c)(3) of that Act (Appendix, *infra*) provides that no gain or loss shall be recognized where one or more persons transfer any property to a corporation and immediately thereafter are in control thereof, providing in the case of two or more persons the stock or securities received from such corporation are in substantially the same proportion as their interests in the property before transfer. It defines control as the ownership of at least 80 per cent of the voting stock and at least 80 per cent of the total number of shares of all other classes of stock of the corporation.

The District Court held that taxpayer received his stock in Lawrence Barker, Inc., as a result of an exchange described in Section 112(b)(5) of the Revenue Act of 1934.

Accordingly, it determined taxpayer's basis per share as \$52.18, a figure apparently derived with reference to the cost basis of the original Barker California stock held by him. Therefore, it found that taxpayer had realized a capital gain upon the sale of his stock, albeit a smaller gain than had originally been reported on taxpayer's income tax return for 1943. Accordingly, judgment was entered in taxpayer's favor [R. 146-147], but for a smaller amount than the amount sought in taxpayer's complaint. [R. 8.]

It is our position that taxpayer received his Lawrence Barker, Inc., stock as a result of a transfer which qualifies under Section 202(c)(3) of the Revenue Act of 1921 and Section 112(b)(5) of the Revenue Acts of 1932 and 1934 as an exchange upon which no gain or loss is to be recognized; that accordingly this stock took the same basis as that of the property exchanged therefor; that the property exchanged for the Lawrence Barker, Inc., stock, namely, shares or right to shares of Barker Delaware, was acquired by taxpayer in a non-taxable exchange for shares of Barker California and hence took the basis of the Barker California stock.

A. Taxpayer Acquired His Lawrence Barker, Inc., Stock as a Result of a Tax-free Exchange Within the Meaning of Section 202(c)(3) of the Revenue Act of 1921 and Section 112(b)(5) of the Revenue Acts of 1932 and 1934.

Lawrence Barker, Inc., certain stock in which was sold by taxpayer during the taxable year 1943, was organized on December 22, 1923, by the Lawrence Barker interests, a closely knit family group, for the specific purpose of holding certain shares of stock which the Lawrence Barker interests were to receive upon the reorganization or merger

of Barker California into Barker Delaware. On December 28, 1923, in exchange for the shares of common stock in Barker Delaware to which taxpayer and his associates (known as the Lawrence Barker interests) were entitled, Lawrence Barker, Inc., issued to taxpayer and his associates all but three of the 20,000 shares of its common stock, in the same proportion that those interests were entitled to receive stock in Barker Delaware. Immediately after this exchange, the Lawrence Barker interests, by virtue of holding 19,997 shares of Lawrence Barker, Inc., common, the only outstanding stock, controlled that corporation.

This transaction clearly comes within the terms of Section 202(c)(3) of the Revenue Act of 1921 and Section 112(b)(5) of the Revenue Acts of 1932 and 1934. These sections provide that where a person or persons transfer property (in this case stock in Barker Delaware) to a corporation and receive therefrom stock or securities in the same proportion as their interest in the property transferred, and where they then control the corporation by virtue of holding 80 per cent of the outstanding voting stock and 80 per cent of all other classes of stock in the corporation, then the transaction is one upon which no gain or loss is recognized. The transaction herein is the simplest kind of transfer under the statute. See Treasury Regulations 62, Art. 1566(c), Example (1). (Appendix, *infra*.) Thus the stock in Lawrence Barker, Inc., which was received by the Lawrence Barker interests takes as its basis the basis of the property transferred to the corporation, the basis of the Barker Delaware stock. Section 113(a)(6) of the Revenue Acts of 1932 and 1934.

B. Taxpayer Acquired His Barker Delaware Stock as a Result of a Tax-free Reorganization, Within the Meaning of Section 202(c)(2) of the Revenue Act of 1921 and Section 112(b)(3) of the Revenue Act of 1932.

As noted above, Section 202(c)(2) of the Revenue Act of 1921 as well as Section 112(b)(3) of the Act of 1932 provides for the nonrecognition of gain or loss if, pursuant to a plan of reorganization, stock or securities in a corporation a party thereto are exchanged solely for stock or securities in another corporation a party to the reorganization. Section 112(i)(1) of the Revenue Act of 1932 (Appendix, *infra*) defines a reorganization to be—

(A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation) * * *, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.²

Section 112(i)(2) describes a party to a reorganization as including a corporation resulting from a reorganization and includes both corporations where one acquires at least a majority of the voting stock and at least a majority of all other classes of stock of another corporation.

Under the facts of this case, it is clear that both Barker California and Barker Delaware are to be considered parties to a reorganization under Section 112(i)(2), for there is no dispute that Barker Delaware acquired all the Barker

²This quoted definition of "reorganization" likewise was contained in Section 202(c)(2) of the Revenue Act of 1921, Chap. 136, 42 Stat. 227.

California common stock, redeemed and retired all the Barker California preferred, and acquired all the assets of the old corporation. Thus at the completion of the plan Barker Delaware owned all of the assets formerly owned by Barker California and all the stock of all classes of Barker California. The C. H. Barker interests, which had owned a majority stock interest in Barker California, owned the majority stock interest in Barker Delaware which had been received in exchange for their Barker California stock.

With respect to Barker California, Barker Delaware and the C. H. Barker interests which held the majority stock interest in the old corporation and which acquired in exchange therefor a majority interest in the new corporation, there can be no serious question that a nontaxable reorganization and exchange within the purview of the revenue laws occurred. There was clearly the acquisition by one corporation of all the stock and all the assets of another corporation and hence a literal and complete compliance with the definition of "reorganization."

The continued participation in the new corporation by the majority interests of the old, without more, would provide the necessary continuity of interest required by the decisions of *Pinellas Ice Co. v. Commissioner*, 287 U. S. 462, and *Helvering v. Minnesota Tea Co.*, 296 U. S. 378. Indeed, the identity of Barker California as a continuing business enterprise was basically unchanged, although its state of incorporation and stock structure were changed. The real change effected was to change the stock structure from outstanding capital stock of 5,750 shares of voting preferred and 17,894.35 shares of common [R. 22] to outstanding capital stock of 25,000 shares of first preferred, 23,935 shares of second preferred, and 100,000 shares of

no par common. [R. 34.] The procedural steps merely enabled the new corporation as recapitalized to acquire the assets of the old. *Cf. Helvering v. Limestone Co.*, 315 U. S. 179, 185.

There can be no contention that there was not a reorganization plan. The plan was full and complete [R. 51-56] and its aims were effected. It was agreed upon for the purpose of reorganizing Barker California and readjusting the several stock interests [R. 45, 51] and the plan was consummated. [R. 33-34.] We do not contend in this respect that Lawrence Barker, Inc., was a party to the reorganization. But such a contention is not necessary to the application of Section 112(b)(3). The participation of Lawrence Barker, Inc., did not change the ultimate purpose of the transactions herein—to exchange ownership of shares in Barker California for ownership of shares in Barker Delaware. It is that exchange which constitutes the real issue herein.

We have shown that if the series of transactions involved in the plan so far as it pertained to the reorganization of Barker California should be examined in the light of the ultimate result, examining the termination only in the light of the commencement, without substantial attention to the procedural steps in between (*e. g.*, *Halliburton v. Commissioner*, 78 F. 2d 265 (C. A. 9th); *S. Klein on the Square, Inc. v. Commissioner* (C. A. 2d), decided April 4, 1951 (1951 P-H Fed. Tax Serv., par. 72,322)), the critical exchanges were nontaxable.

The formation by the Lawrence Barker interests of Lawrence Barker, Inc., as a holding company for their Barker Delaware stock did not destroy the otherwise nontaxable exchange of Barker California stock for Barker Delaware stock. *Bus & Trans. Corp. v. Helvering*, 296

U. S. 391; *Groman v. Commissioner*, 302 U. S. 82; *Helvering v. Bashford*, 302 U. S. 454; *Lawrence v. Commissioner*, 123 F. 2d 555 (C. A. 7th); *Anheuser-Busch, Inc. v. Helvering*, 115 F. 2d 662 (C. A. 8th), certiorari denied, 312 U. S. 699, are inapplicable. These cases all involved situations where a corporation or its stockholders, after the completion of a plan of reorganization, owned in place of transferred assets stock in some corporation other than the corporation to which the transferred assets were ultimately conveyed. That is to say, the assets were either transferred to a subsidiary corporation and the original transferors received stock in the parent, or the assets were transferred to the parent and the original transferors received stock in the subsidiary.

We consider the facts herein distinguishable from such situations. Lawrence Barker, Inc., was not a subsidiary either of Barker California or Barker Delaware. It was a convenient holding company for the securities of the Lawrence Barker interests. To apply the cases just noted would ignore what, for lack of a better definition, might be described as the intra-identity of Lawrence Barker, Inc., and the individuals composing Lawrence Barker interests. Because of the close family relationship involved, Lawrence Barker, Inc., should be treated more as a wholly owned personal corporation (*cf. Higgins v. Smith*, 308 U. S. 473), rather than as a component of a corporate pyramid. Where a stockholder holds stock in the parent of a wholly-owned subsidiary, his control of the subsidiary is admittedly indirect and elusive, and it may be convincingly argued that there is no continuity of interest between the individual and the subsidiary. *Bus & Trans. Corp. v. Helvering*, *supra*. But there is a clear continuity, if not identity of interest, where the Lawrence Barker interests hold shares in Barker California directly and where they

hold similar shares in the new Barker Delaware through the device of a corporation whose only function is to hold securities. This is not to say that Lawrence Barker, Inc., is the *alter ego* of the Lawrence Barker interests. Cf. *Schuh Trading Co. v. Commissioner*, 95 F. 2d 404, 411 (C. A. 7th). Nor do we seek to ignore a corporate entity. But the relationship is so peculiarly close between the Lawrence Barker interests and Lawrence Barker, Inc., that substance is ignored if Lawrence Barker, Inc., is merely described as not a party to the reorganization, and if therefore it be said that taxpayer's receipt of its stock cannot be brought within the scope of Section 112(b)(3). The instant case presents, we believe, a situation which should be distinguished from the *Bus & Trans. Corp., Groman, Bashford, Lawrence* and *Anheuser-Busch* situations, because not to do so would completely lose sight of subordinate steps in the transaction herein which have a direct bearing on the true substance and ultimate result, within the rule of *Founders General Corp. v. Hoey*, 300 U. S. 268, 275. To say that substance prevails over form by considering the ultimate picture as between the Lawrence Barker interests and Lawrence Barker, Inc., to be the same as that involving stockholder, parent, and subsidiary is to take too superficial a view of what really happened in 1923 and 1924 herein to allow such an approach to be called the prevailing of substance over form. On the contrary, it allows appearances to subordinate the true result of the 1923 reorganization, which was to readjust in Barker California by reorganization the stock interests therein of its several stockholders.

It will not do, moreover, as might be argued, to say that the reorganization plan depended upon the participation of Lawrence Barker, Inc. The function of Lawrence

Barker, Inc., could as well have been performed whether it had been incorporated or not. Its creation or noncreation had no effect upon the rights of the stockholders as a group, as was true in the *Bus & Trans. Corp.*, *Groman*, and *Bashford* line of cases. The creation of Lawrence Barker, Inc., served only the individual purposes of the several individuals composing Lawrence Barker interests, who were minority stockholders in both Barker California and Barker Delaware. Thus, further, is the situation at bar distinguished from that line of decisions.

C. Taxpayer Acquired His Stock in Lawrence Barker, Inc., as the Result of a Tax-free Reorganization, Within the Meaning of Section 202(c)(3) of the Revenue Act of 1921.

In the alternative, we argued below that taxpayer acquired his stock in Lawrence Barker, Inc., upon an exchange in which no gain or loss was to be recognized within the meaning of Section 112(b)(5) of the Revenue Act of 1934. This is similar not only to Section 112(b)(5) of the 1932 Act upon which taxpayer relies, but it is also similar in material respects to Section 202(c)(3) of the Revenue Act of 1921.

These sections provide that no gain or loss shall be recognized upon an exchange where one or more persons transfer property to a corporation and immediately thereafter are in control thereof, provided that if two or more persons are involved the stock or securities of such corporation received upon the exchange are in substantially the same proportion as their interest in the property transferred to it. Section 202(c)(3) defines control as the ownership of 80 per cent or more of all the voting stock and 80 per cent of all other classes of stock. Section 112(h) of the 1934 Act and Section 112(j) of the 1932 Act similarly provide.

It is to this aspect of the problem that taxpayer directs his brief, relying only upon the proposition that taxpayer did not own the requisite percentage of shares of stock in the transferee corporation. At the outset, it is well to state that the fact that Section 202(c)(2) of the 1921 Act or Section 112(b)(3) of the Revenue Acts of 1932 and 1934 may be applicable herein does not foreclose application of the provisions of Section 202(c)(3) of the 1921 Act or Section 112(b)(5) of the Acts of 1932 and 1934. The provisions of the two subsections of Section 112(b) are complementary and frequently overlap. *Helvering v. Cement Investors*, 316 U. S. 527; *Skouras v. Commissioner*, 45 B. T. A. 1024, appeal dismissed, August 17, 1942 (C. A. 9th). And, while customarily the application of Section 112(b)(5) or Section 202(c)(3) redounds to a taxpayer's benefit, it may be applied, as in the case herein, to his detriment. *Portland Oil Co. v. Commissioner*, 109 F. 2d 479 (C. A. 1st), certiorari denied, 310 U. S. 650.

With respect to the applicability of Section 202(c)(3)³ taxpayer defines the issue herein (Br. 20) as whether the Barker California stockholders—

after the 1923 exchange whereby all the common stockholders of California exchanged their stock for 95,697 shares of Delaware stock, said California stockholders were in "control" of Delaware so as to constitute the transaction a tax-free exchange within the meaning of Section 112(b)(5).

³For clarity, we shall confine our discussion on this question to the terms of Section 202(c)(3), although it is equally applicable to Section 112(b)(5) of the Acts of 1932, 1934, and, in fact, the present terms of the Internal Revenue Code.

By this statement and by the tenor of the entire argument of his brief, taxpayer apparently concedes that with regard to the question of control under the statute the intervention of the closely controlled Lawrence Barker, Inc., does not have any bearing upon the case.

Such a concession is, we submit, entirely correct. For purposes of Section 202(c)(2), we have discussed the problem above, because of an apparent conflict with the *Bus & Trans. Corp.*, *Groman*, and *Bashford* line of decisions. That argument, over and above taxpayer's concession, is equally applicable here. Similarly as with respect to Section 202(c)(2) recognition of Lawrence Barker, Inc., as the effective owner of stock in Delaware perverts the substance of the 1923 transactions which were intended to reorganize Barker California and the respective stock interests of its several stockholders. Thus, laying aside for a moment taxpayer's complaint with respect to a binding obligation to sell stock to Bankers, the existence or non-existence of Lawrence Barker, Inc., was unimportant to the reorganization plan relative to Barker California and Barker Delaware.

The substantial result of the reorganization plan was that the stockholders of Barker California transferred their stock therein to Barker Delaware, in exchange for which they received stock in Barker Delaware. Taxpayer and his associates in the Lawrence Barker interests chose to hold their Delaware stock through Lawrence Barker, Inc. Insofar as the reorganization plan was concerned, the transfer of stock in Barker Delaware was in no way con-

nected with the reorganization nor with the readjustment of stock interests of the several stockholders in Barker California. The cases taxpayer cites in his brief (pp. 23-30) refer to binding obligations to transfer, in accordance with a plan, stock received by a transferor, resulting in decisions that since the transferor's possession was transitory it could not be considered possession coupled with control within the meaning of Section 202(c)(3).

As we have argued above, we believe this case should be approached by considering the separate steps herein, because of the basic importance of the reorganization of Barker California. Because of the importance of that plan, further, we believe the obligation upon the Lawrence Barker interests and Lawrence Barker, Inc., to transfer a portion of their shares to Bankers must be considered a part of another transaction, for the obligation to sell shares to Bankers was not a part of the reorganization plan. It was merely a step in an unrelated liquidation by the Lawrence Barker interests of a portion of their stock assets. This factor presents, we contend, a distinction between the facts herein and those in *Bassick v. Commissioner*, 85 F. 2d 8 (C. A. 2d), certiorari denied, 299 U. S. 592; *Commissioner v. Schumacher Wall Bd. Corp.*, 93 F. 2d 79 (C. A. 9th); and *Haseltine Corp. v. Commissioner*, 89 F. 2d 513 (C. A. 3d), all cited by taxpayer in his brief.

Thus, insofar as the reorganization of Barker California and the transfer of its stock were concerned, taxpayer and his associates in the Lawrence Barker interests and the majority stockholders, or C. H. Barker interests, con-

trolled Barker Delaware immediately after the transfer to it of Barker California stock, within the meaning of Section 202(c)(3). The obligation of the Lawrence Barker interests and Lawrence Barker, Inc., to transfer a part of their subsequently received Barker Delaware first preferred was an obligation independent of and foreign to the reorganization of Barker California.

But, in any event, if because of the binding obligation of the Lawrence Barker interests and through them of Lawrence Barker, Inc., to transfer Barker Delaware first preferred to Bankers be recognized as cutting into the percentage of stock which they may be said to control, taxpayer's argument loses sight of the fact that there was an obligation to sell only 10,870 shares to Bankers. Bankers offered to buy such an amount [R. 58] and the offer was accepted [R. 63]. In addition, Bankers held an option to purchase an additional 10,000 shares. It makes no difference for present purposes that they exercised the option. The option is, after all, nothing more than a continuing offer to sell. Until it is accepted, there is no contract of sale. If the prospective purchaser holds only an option, not until that option is exercised does he become in any way in control of its subject matter. *Lawler v. Commissioner*, 78 F. 2d 567 (C. A. 9th); *Helvering v. Bartlett*, 71 F. 2d 598 (C. A. 4th); *Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son*, 123 Fed. 9 (C. A. 8th). And an outstanding option against a transferor under Section 112 (b)(5) does not affect his control of stock received in the corporation to which he transferred property. *Commissioner v. First Nat. Bank*, 104 F. 2d 865, 871 (C. A. 3d).

Cf. Helvering v. San Joaquin Co., 297 U. S. 496. Accordingly, until Bankers exercised their option, the Lawrence Barker interests through Lawrence Barker, Inc., retained control of the 10,000 shares which were the subject of the option within the meaning of Section 112(b)(5). *Cf. Wilgard Realty Co. v. Commissioner*, 127 F. 2d 514 (C. A. 2d), certiorari denied, 317 U. S. 655. See also *Pacific Refrigerating Co. v. Commissioner*, 100 F. 2d 30 (C. A. 9th); *Portland Oil Co. v. Commissioner*, *supra*; *Schmieg, Hungate & Kotsian, Inc. v. Commissioner*, 27 B. T. A. 337. Until the option was exercised, recognizing *arguendo* that the obligation to transfer 10,870 shares to Bankers existed, the original stockholders in California controlled all but 10,870 shares out of 95,679 shares of Barker Delaware outstanding immediately after the transfer of Barker California stock to it, considerably more than the requisite 80 per cent.

Conclusion.

The instant case presents peculiar facts, and may in some ways resemble other cases on the nonrecognition of gain or loss. But in this sector of the statute, obviously each case must be considered on its own facts. *Pacific Refrigerating Co. v. Commissioner*, *supra*. A reading of the agreement preceding the adoption of a plan of reorganization [R. 45-50] and of the reorganization plan itself [R. 51-56] in the light of relevant provisions of Section 202(c) of the Revenue Act of 1921 suggests that the parties certainly intended a tax-free exchange. *E. g.*, a reorganization upon a transfer of stock for stock was

planned, and planned as a reorganization. Moreover, Barker California stock was to be transferred for Barker Delaware stock so that [R. 52] “each stockholder of the California corporation will have the same proportionate stockholdings in the Delaware corporation as he now has the California corporation.”

Under these circumstances, and in view of the foregoing, we submit that the decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * * * *

(6) [as amended by Sec. 213 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 121(c) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Tax-free exchanges generally.*—If the property was acquired, after February 28, 1913, upon an exchange described in section 112(b) to (e), inclusive, or Section 112(1), the basis (except as provided in paragraphs (15), (17), or (18) of this subsection) shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112(b) or Section 112(1), to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. Where as part of the consideration to the taxpayer another party to the exchange assumed a

liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this paragraph be considered as money received by the taxpayer upon the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

* * * * *

(12) *Basis established by Revenue Act of 1932.*— If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1934, and the basis thereof, for the purposes of the Revenue Act of 1932, 47 Stat. 199, was prescribed by section 113(a)(6), (7), or (9) of such Act, then for the purposes of this chapter the basis shall be the same as the basis therein prescribed in the Revenue Act of 1932.

* * * * *

(16) *Basis established by Revenue Act of 1934.*— If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1936, and the basis thereof, for the purposes of the Revenue Act of 1934 was prescribed by section 113(a)(6), (7), or (8) of such Act, then for the purposes of this chapter the basis shall be the same as the basis therein prescribed in the Revenue Act of 1934.

* * * * *

(26 U. S. C. 1946 ed., Sec. 113.)

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 202. BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(c) For the purposes of this title, on an exchange of property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized.

* * * * *

(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party or resulting from such reorganization. The word "reorganization," as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, (however effected); or

(3) When (A) a person transfers any property, real, personal or mixed, to a corporation, or (B) two or more persons transfer any such property to a corporation, and immediately after the transfer are in control of such corporation, and the amounts of stock, securities, or both, received by such persons are in substantially the same proportion as their interests in the property before such transfer. For

the purposes of this paragraph, a person is, or two or more persons are, “in control” of a corporation when owning at least 80 percentum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized of stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(i) *Definition of Reorganization.*—As used in this section and sections 113 and 115—

(1) The term “reorganization” means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stock-

holders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) or Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) *Tax-free exchanges generally.*—If the property was acquired upon an exchange described in section 112(b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112(b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than

money) received, and for the purpose of the allocation there shall be assigned to such other property in amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

* * * * *

Revenue Act of 1934, c. 277, 48 Stat. 680:

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(b) *Exchanges Solely in Kind.*—

* * * * *

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(h) *Definition of Control.*—As used in this section the term “control” means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) *Tax-free exchanges generally.*—If the property was acquired, after February 28, 1913, upon an exchange described in section 112(b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112(b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount

equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

* * * * *

Treasury Regulations 62, promulgated under the Revenue Act of 1921:

Art. 1566. *Exchange of property which results in no gain or loss.*—Where property is exchanged for other property, even if the property received in exchange has a readily realizable market value, no gain or loss is recognized:

* * * * *

(b) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization" as used in this paragraph includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the outstanding voting stock and at least a majority of the total number of outstanding shares of all other classes of stock of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, however effected. Under this paragraph it makes no difference whether the stock or securities received are or are not of a like kind or class. So long as the property received in the reorganization consists of stock or securities within the usual meaning and acceptance of these

terms, no gain or loss is recognized. Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock to or resulting from the reorganization. Where in connection with an internal adjustment of the affairs of a corporation, either by recapitalization or a change in identity, form, or domicile (however effected), a person receives in place of the stock or securities owned by him new stock or securities of the corporation, no gain or loss is realized. In this connection, see article 1568.

(c) When (A) a person transfers any property, real, personal, or mixed, to a corporation, and immediately after the transfer is in control of such corporation, or (B) two or more persons transfer any such property to a corporation, and immediately after the transfer are in control of such corporation, and the amounts of stock, securities, or both, received by such persons are in substantially the same proportion as their interests in the property before such transfer. For the purposes of this paragraph, a person is, or two or more persons are, "in control" of a corporation when owning at least 80 per cent of the outstanding voting stock and at least 80 per cent of the total number of outstanding shares of all other classes of stock of the corporation.

Examples.—(1) A and B each own an undivided one-half interest in certain property. Corporation X is created, to which A and B transfer the property, each receiving in exchange therefor 50 per cent of the stock of the corporation X. No gain or loss is realized from this exchange.

(2) A, who owns common stock in the X corporation of the par value of \$70,000, transfers certain property to the corporation, for which he received additional common stock of the par value of \$15,000. The X corporation has outstanding immediately after the transfer only common stock of the par value of \$100,000. No gain or loss is realized from this exchange.

(3) A owns certain property which he transfers to the corporation X, a going concern, in which he owns common stock of the par value of \$280,000 and class A non voting preferred stock of the par value of \$70,000. The X corporation immediately after the transfer has outstanding common stock of the par value of \$400,000, class A non-voting preferred stock of the par value of \$25,000. No gain or loss is realized from this exchange.

(4) A owns certain property which he transfers to corporation X, a going concern, in which A owns no stock, in exchange for common stock of the corporation of the par value of \$170,000. The X corporation has outstanding immediately after the transfer common stock of the par value of \$200,000 and non voting preferred stock of the par value of \$50,000. A realized a gain or loss from this exchange measured by the difference between the basis of the property exchanged and the fair market value, if readily realizable, of the stock received in the exchange. If the property exchanged was acquired prior to March 1, 1913, see article 1561.

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.113(a)(6)-1 [as amended by T. D. 5402, 1944 Cum. Bull. 229]. *Property Acquired Upon a Tax-Free Exchange*.—In the case of an exchange, after February 28, 1913, of property solely of the type described in section 112(b) or (1), if no part of the gain or loss was recognized under the law applicable to the year in which the exchange was made, the basis of the property acquired is the same as the basis of the property transferred by the taxpayer with proper adjustments to the date of the exchange.

* * * * *

SEC. 29.113(a)(12)-1. *Basis of Property Established by Revenue Act of 1932*. Section 113(a)(12) provides that if the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1934, and the basis of the property, for the purposes of the Revenue Act of 1932, was prescribed by section 113(a)(6), (7), or (9) of that Act, then for the purposes of the Internal Revenue Code the basis shall be the same as the basis therein prescribed in the Revenue Act of 1932.

* * * * *

SEC. 29.113(a)(16)-1. *Basis of Property Established by Revenue Act of 1934*.—Section 113(a)(16) provides that if property was acquired after February 28, 1913, in

any taxable year beginning prior to January 1, 1936, and the basis of the property for the purposes of the Revenue Act of 1934 was prescribed by section 113(a)(6), (7), or (8) of that Act, then for the purposes of the Internal Revenue Code the basis shall be the same as the basis therein prescribed under the Revenue Act of 1934. For example, if after December 31, 1920, and in any taxable year beginning prior to January 1, 1936, property was acquired by a corporation by the issuance of its stock or securities in connection with a transaction which is not described in section 112(b)(5) of the Code but which is described in section 112(b)(5) of the Revenue Act of 1934, the basis of the property so acquired shall be the same as it would be in the hands of the transferor, with proper adjustments to the date of the exchange.

No. 12826.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

PETITION OF APPELLANT FOR REHEARING.

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FILED

DEC 22 1952

PAUL F. O'BRIEN

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IN THE

United States Court of Appeals

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LAWRENCE BARKER,

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Appellee.

On Appeal From the United States District Court for the
Southern District of California.

PETITION OF APPELLANT FOR REHEARING.

*To the Honorable, the United States Court of Appeals for
the Ninth Circuit:*

Lawrence Barker, the appellant herein, by and through his attorneys of record, hereby petitions this Honorable Court to rehear the above entitled case, and upon rehearing to modify its decision and to grant the relief prayed for.

On November 25, 1952, this Court affirmed the decision of the District Court upon the grounds (not relied upon by the District Court¹) that (1) appellant's basis for his

¹The District Court's decision was based entirely upon the conclusion that the exchanges in 1923, whereby appellant acquired his Securities Company stock, were all nontaxable exchanges within Section 112(b)(5) of the Revenue Act of 1934 (identical with Section 112(b)(5) of the Revenue Act of 1932) [R. 144-145], a conclusion correctly rejected by this Court in its decision.

Securities Company stock is the same as the basis of the Barker Delaware stock (Slip Op. 7) which was issued in exchange for appellant's Barker California stock, and (2) the basis of the Barker Delaware stock was the same as the basis of the Barker of California stock exchanged because the "Barker California-Barker Delaware transaction was a reorganization under the Revenue Act of 1932." (Slip Op. 14.)

Appellant does not now question the correctness of the Court's decision that the Barker California-Barker Delaware transaction was a reorganization under the Revenue Act of 1932. We respectfully submit, however, that the exchange falls not only under Section 112(b)(3) and Section 112(i)(2) of the Revenue Act of 1932, as stated by the Court (Slip Op. 14), but also falls under Section 112(c)(1) of the Revenue Act of 1932, which states:

"If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property."

This Court has recognized that as part of the plan of reorganization "a contract was made between the C. H. Barker group and the Lawrence Barker Interests on the one hand and the Bankers on the other whereby the Bankers agreed to buy . . . 10,870 shares of Barker Delaware first preferred stock from the Lawrence Barker Interests; . . .," (Slip Op. 4), and that the "Lawrence

Barker Interests . . . would thus end up with cash” (Slip Op. 4) at least to that extent. As further stated by the Court, “pursuant to the terms of the agreement of December 20, 1923, the Securities Company sold to Bankers 10,870 shares of first preferred stock of Barker Delaware for \$1,000,040 plus dividends accrued.” (Slip Op. 6.)

The exchange of Barker California stock, therefore, by appellant in 1923, was not solely for Barker Delaware stock, but for Barker Delaware stock and cash, at least to the extent of \$1,000,040. Under the provisions of Section 112(c)(1) of the Revenue Act of 1932, *supra*, gain of at least \$1,000,040 must, therefore, have been taxable to appellant from the 1923 transactions. (See *First Seattle Dexter Horten National Bank, et al. v. Commissioner* (C. C. A. 9th, 1935), 77 F. 2d 45.)

This is clearly the decision of the Board of Tax Appeals, on similar facts and an identical statute, in *Henry Hudson v. Commissioner*, 39 B. T. A. 1075, 1095 (Acq. 1939-2 C. B. 18), wherein it is stated:

“. . . Herein the reorganization was dependent upon the sale of 100,000 shares of Sylphone Co. stock through Barney & Co. (Bankers), and the gain resulting from the exchange is taxable pursuant to Section 203(d)(1) of the Act of 1926 *to the extent of the cash received.*” (Italics added.)

As this Court has stated, the basis of the Securities Company stock to appellant is dependent on the outcome of the Barker California-Barker Delaware reorganization. Obviously, the fact that the Securities Company was formed and that as part of the plan the property to which the Lawrence Barker Interests were entitled as a result

of the Barker California-Barker Delaware reorganization was to be immediately transferred to Securities Company does not change the tax consequences of the Barker California-Barker Delaware reorganization.

The basis for the Securities Company stock, as the appellee has consistently urged and this Court has recognized, is to be determined under the Revenue Act of 1932, by referring to Section 112(b)(5) of that Act, one of the Sections referred to in Section 113(a)(6) of the Revenue Act of 1932, the governing statute as decided by the Court (Slip Op. 7). As the basis of the Securities Company stock is thus to be determined from the basis of the property exchanged therefor, the fact that a part of the Barker Delaware stock thus received by the Securities Company was bound under the contract with Bankers to be sold to them forthwith for cash made that part the equivalent of cash (and, in any event, not *stock* but a contract right to the proceeds from the sale of stock) when transferred to Securities Company.

In other words, the Barker Delaware shares bound under the agreement of sale to Bankers are to be treated as cash or its equivalent (fair market value of property other than that permitted to be received under Section 112(b)(3) of the Revenue Act of 1932, from the Barker California-Barker Delaware reorganization, without recognition of gain) under Section 113(a)(6) of the Revenue Act of 1932. This is true both for arriving at the recognized gain to appellant from the 1923 transactions and for computing the basis of the Securities Company stock then issued to appellant.

In view of the foregoing, the basis of the property exchanged for the Securities Company stock is at least \$2,326,121.86, arrived at as follows: \$1,326,081.86, the

basis of the Barker California shares owned by the Lawrence Barker Interests [R. 32], plus \$1,000.040, the recognized taxable gain to the Lawrence Barker Interests from the Barker California-Barker Delaware reorganization because of the precedent sale of Barker Delaware shares to Bankers as a part of said reorganization.² Thus, the basis for the Securities Company stock in the hands of the Lawrence Barker Interests is \$2,326,121.86.

Applying the foregoing, appellant's basis for his Securities Company stock is at least \$102.17 per share: \$235,031.56, appellant's basis for his Barker California stock [R. 32] plus \$225,139.71, which is $1841.50/8179.69$ of \$1,000.040 (appellant's share of the recognized gain from the Barker California-Barker Delaware reorganization); or \$460,171.28; divided by 4504.13, which is the number of Securities Company shares issued to appellant [R. 28].

In closing, appellant respectfully submits that since there can be no question that appellant would have had recognized gain from the Barker California-Barker Delaware reorganization had the plan not included the formation of Securities Company, this Court's holding that the formation of Securities Company was not an essential

²Section 113(a)(6) of the Revenue Act of 1932. Whether the recognized gain from the Barker California-Barker Delaware reorganization be deemed to be in the form of property (the contract of sale of Barker Delaware shares to Bankers) or of cash (the right to the proceeds from the sale of Barker Delaware shares to Bankers), the result must be the same under the terms of Section 113(a)(6), and the basis of the Securities Company stock in either event is the aggregate of the original basis of Barker California shares and recognized gain from the Barker California-Barker Delaware reorganization since all of the property and cash ultimately rested in Securities Company in exchange for its stock.

part of the Barker California-Barker Delaware reorganization compels the conclusion that appellant did have recognized gain, as aforesaid. We respectfully submit that the Court has not considered this contention in its opinion. In view of the importance of this question to appellant, we respectfully submit that the Court's opinion should deal with this question.

Wherefore, appellant prays that this Honorable Court modify its decision, reverse the decision of the District Court, and determine that the basis of appellant's shares of Securities Company stock is \$102.17 per share.

December, 1952.

Respectfully submitted,

IRELL & MANELLA,
LAWRENCE E. IRELL,
ARTHUR MANELLA,

Attorneys for Appellant.

Certificate of Counsel.

I, Lawrence E. Irell, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

LAWRENCE E. IRELL,
Attorney for Petitioner.

No. 12,826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

PETITION OF THE UNITED STATES FOR REHEARING.

ELLIS N. SLACK,
Acting Assistant Attorney General.

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Special Assistants to the Attorney General.
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312 North Spring Street,
Los Angeles 12, California.

FILED

JUN 3 1952

PAUL P. O'BRIEN
CLERK

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No. 12,826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

PETITION OF THE UNITED STATES FOR REHEARING.

*To the Honorable, the United States Court of Appeals
for the Ninth Circuit:*

The United States of America, the appellee herein, by and through its attorneys of record, hereby petitions this Honorable Court to rehear the above-entitled case, and upon rehearing to grant the relief prayed for.

On May 6, 1952, this Court reversed the decision of the District Court. In so doing, the Court fell into error, we respectfully submit, through the use of the wrong statute.

This Court correctly held (Slip Op. 10) that since it is only necessary for the transaction to fall within

one of the subdivisions of Sections 112(b) to (e) in order to be classified as tax-free and thus postpone any recognition of gain or loss for tax basis purposes, it is necessary to consider the applicability of Section 112(b)(3).

This Court also correctly held (Slip Op. 7-8) that the Barker Delaware stock was acquired within the purview of Section 113(a)(12) of the Internal Revenue Code, and that the provisions of this section of the Code were first enacted in 1934 in order to make it clear that taxpayers who have acquired property in any taxable year beginning prior to January 1, 1934, under tax-free exchanges, where the basis is provided for in Section 113(a)(6), (7), and (9) of the Revenue Act of 1932, c. 209, 47 Stat. 169, must retain such basis, that is, the basis provided in the Revenue Act of 1932.

The Court having thus held that the Internal Revenue Code requires that the taxpayer retains the basis provided in the Revenue Act of 1932 if the 1923 transaction was a tax-free exchange and having further held (Slip Op. 8) that reference must be made to the tax law as it stood in 1923, the year of the transfer, to determine whether or not any gain in the value of the Barker California stock was recognized in that year, it follows that the Court should have tested the transaction by the definition of "reorganization" as contained in Section 112(i) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and in Section 202(c) of the Revenue Act of 1921, c. 136, 42 Stat. 227. These statutes are set forth at pages 3 to 5 of the Appendix to the Government's brief. Insofar as here pertinent, they contain identical definitions of the term "reorganization," namely, "a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock

and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation).”

Inconsistently with the holdings of the Court which we have referred to above, the Court, inadvertently we believe, tested the question of tax-free reorganization by the definition of “reorganization” as contained in Section 112(g) of the Internal Revenue Code. (Slip Op. 10-12.) The definition of “reorganization” contained in the Internal Revenue Code is, however, materially different from the definition in the applicable Revenue Acts of 1921 and 1932.

If the statutory provisions of the Revenue Acts of 1921 and 1932, which by Section 113(a)(12) of the Internal Revenue Code are required to be used, are applied to the transactions here involved, then, under the Court’s own reasoning, the conclusion that there was a tax-free reorganization of Barker California into Barker Delaware must follow.

Viewing, as the Court did, the plan as a whole, Barker Delaware ended up with all of the stock and all of the assets of Barker California. That of course was literal compliance with the definition of “reorganization” contained in the Revenue Acts of 1921 and 1932. A gloss written upon the statute by the Supreme Court in *Pinellas Ice Co. v. Commissioner*, 287 U. S. 462, requires some substantial continuity of interest. Such a continuity of interest will exist where either common or preferred stock is issued to the transferor corporation or its stockholders. (*Helvering v. Minnesota Tea Co.*, 296 U. S. 378; *Nelson Co. v. Helvering*, 296 U. S. 374.) In the present case, as held by this Court (Slip Op. 12),

one group of stockholders of the old corporation ended up with control of the new corporation and the other group (that here involved) got an investment interest in the new corporation represented by preferred stock. It follows, *a fortiori* from the *Nelson Co.* decision, *supra*, that the transactions here involved constituted a "reorganization" within the purview of the 1921 and 1932 laws, for in the *Nelson Co.* case it was held that the transaction was a "reorganization" although none of the stockholders of the transferor received anything other than cash and preferred stock of the transferee.

If this Court, upon reconsideration, concludes, as we submit it should, that the transaction here involved between Barker California and Barker Delaware was a "reorganization" then there can be no question that the exchange by the Lawrence Barker group of their stock in Barker California for preferred stock of Barker Delaware was tax-free under Section 202(c)(2) of the Revenue Act of 1921, *supra*, for preferred stock is clearly a "security," and there would be within the purview of the statute the receipt by a person "in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization." See cases cited above and also *Helvering v. Watts*, 296 U. S. 387, where the exchange of stock for bonds in connection with a reorganization was held to be a tax-free exchange. Thus under Section 113(a)(6) of the Revenue Act of 1932, the basis of the Barker Delaware stock would be the same as in the case of the Barker California stock exchanged. And, as held by this Court (Slip Op. 12) "since the basis of the Securities Company stock is the same as that of the Barker Delaware stock," the basis of the Barker California stock

would therefore become the basis of the Securities Company stock. From this it would follow that the decision of the District Court should be affirmed.

Wherefore, the United States of America prays that this Honorable Court grant this petition for rehearing, with reargument of the case if deemed advisable by the Court, and that it affirm the decision below.*

Respectfully submitted,

ELLIS N. SLACK,
Acting Assistant Attorney General.

LEE A. JACKSON,
CAROLYN R. JUST,
*Special Assistants to the
Attorney General.*

WALTER S. BINNS,
United States Attorney.

E. H. MITCHELL,
EDWARD R. McHALE,
Assistant United States Attorneys.

EUGENE HARPOLE,
*Special Attorney, Bureau of
Internal Revenue.*

May, 1952.

*Attention of the Court is also respectfully called to the fact that where reference is made on pages 7, 8 and 12 of the Slip Opinion to the agreed cost of the Barker Delaware stock, if measured in terms of the 1923 market value of the Barker California stock for which it was exchanged, the figure should be \$100 instead of \$219.35. See paragraph XIX of the Stipulation of Facts. [R. 32.] This \$100 figure would be a stepped-up basis for the Barker Delaware stock which we submit is not properly to be used, but if used it would produce a basis of \$219.38 for each of the Securities Company shares, while the taxpayer contends only for a basis of \$219.35. The explanation of the difference in computation lies in the fact that the exchanges were not share for share.

Certification.

It is hereby certified by counsel for the appellee in the above-entitled case that this petition for rehearing is presented solely in good faith and because of the importance of the issue involved to the proper and efficient administration of the revenue laws, and in nowise for purposes of delay.

E. H. MITCHELL,
Assistant United States Attorney,
Counsel for Appellee.

May, 1952.

No. 12826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

REPLY TO POINTS MADE IN PETITION OF
THE UNITED STATES FOR REHEARING.

IRELL & MANELLA,
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No. 12826
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

REPLY TO POINTS MADE IN PETITION OF
THE UNITED STATES FOR REHEARING.

*To the Honorable, the United States Court of Appeals
for the Ninth Circuit:*

The appellant herein, by and through his attorneys of record, in accordance with the Order of the Court made on September 18, 1952, granting the petition of the appellee herein for rehearing, hereby replies to the points made by the appellee in its petition for rehearing.

I.

This Court, in its original Opinion, correctly stated, as to the basis of the Barker Delaware stock to the Lawrence Barker interests, that "if no subdivision of Section 112(b) to (e) is applicable, then the basis of the Barker

Delaware stock is stepped up to its 1923 market value . . . per share” and “the basis of the Securities Company stock would . . . be \$219.35” per share. (Slip Op. 8.) It is respectfully submitted that the Court also correctly concluded that no subdivision of Section 112(b) to (e) of the Internal Revenue Code, the Revenue Act of 1934, or the Revenue Act of 1932, is applicable in this case to determine the basis of the Barker Delaware stock to the Lawrence Barker interests.

If the Court erred, as averred by appellee in its petition for rehearing, in referring solely to the provisions of Section 112(g) of the Internal Revenue Code for the definition of “reorganization” referred to in Section 112(b)(3), it is nevertheless true that the same conclusion as reached by the Court would follow from application of the provisions of Section 112(g) of the Revenue Act of 1934, which defines “reorganization” in terms substantially the same as does the Internal Revenue Code.

The enactment of the Internal Revenue Code did not bring about substantive changes in the definition of “reorganization” or in the provisions to be applied in determining “basis.” Thus reference to the various provisions governing basis, included in the Internal Revenue Code, should include consideration of Section 113(a) (16), incorporated in the Code, which was originally enacted as part of the Revenue Act of 1936.

Section 113(a)(16) states:

“If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1936, and the basis thereof, for the purposes of the Revenue Act of 1934 was prescribed by Section 113(a)(6), (7), or (8) of such Act, then for the

purposes of this chapter the basis shall be the same as the basis therein prescribed in the Revenue Act of 1934.” (Emphasis added.)

Congress made no apparently visible distinction between acquisitions to be governed by Section 113(a)(16), newly enacted in the Revenue Act of 1936, and acquisitions formerly governed in precisely the same manner by Section 113(a)(12) of the Revenue Act of 1934. Though the latter Section was reenacted as part of the Revenue Act of 1936, a thorough search has uncovered no Committee Report dealing with this or with the enactment of Section 113(a)(16) of the Revenue Act of 1936, and it is, therefore, respectfully suggested that this most recent enactment which is in plain terms applicable to acquisitions “after February 28, 1913, in any taxable year beginning prior to January 1, 1936,” should govern the acquisition of the Barker Delaware stock by the Lawrence Barker interests. (See *Forstmann v. Rogers* (C. C. A. 3rd, 1942), 128 F. 2d 126.)

If Section 113(a)(16) of the Internal Revenue Code, originally enacted as Section 113(a)(16) of the Revenue Act of 1936, is to be applied to this case, then Section 113(a)(6) of the Revenue Act of 1934, rather than Section 113(a)(6) of the Revenue Act of 1932, is to be applied to determine the basis of the Barker Delaware stock. Appellant respectfully submits that the reasoning applied by the Court in the *Forstmann* case, *supra*, to a comparable situation involving earlier years, is authority for the conclusions herein stated. Accordingly, the result would be the same as already stated by this Court in its original Opinion. For the definition of “reorganization,” contained in Section 112(g) of the Revenue Act

of 1934, is, as stated hereinabove (for the purposes of this case), the same as the definition of "reorganization" in the Internal Revenue Code, which was applied to this case by the Court in its original Opinion.

II.

If the propositions advanced by appellee in its petition for rehearing are hypothetically assumed to be correct, nevertheless they fail to state completely the law which would then be applicable to this case.

Section 113(a)(6) of the Revenue Act of 1932, referred to by appellee, states:

"If the property was acquired upon an exchange described in Section 112(b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made"

As stated by the Court in its original Opinion,

" . . . if any subdivision of section 112(b) to (e) of the law . . . describes the transaction between Barker California and Barker Delaware, further reference must be made to the tax law as it stood in 1923, the year of the transfer, to determine whether or not any gain in the value of Barker California stock was recognized in that year since the basis of Barker Delaware would be the same as that of Barker California, plus the amount of any gain . . . recognized in 1923." (Slip Op. 8.)

Section 202(e) of the Revenue Act of 1921, as amended by Act of March 4, 1923, effective January 1, 1923, states:

“ . . . ; but when the property is exchanged for property specified in paragraphs (1), (2), and (3) of subdivision (c) as received in exchange, together with money or other property of a readily realizable market value other than that specified in such paragraphs, the amount of gain resulting from such exchange shall be computed in accordance with subdivisions (a) and (b) of this section, but in no such case shall the taxable gain exceed the amount of the money and the fair market value of such other property received in exchange.”

The general rule covering recognition of taxable gain from exchanges of property has been the same under all revenue acts and the Code: Gain is recognized to the extent of the excess of the fair market value of the property received on the exchange over the cost or other basis of the property exchanged. The exception to this rule, pertinent to this case and to the point presently discussed, is found in Section 202(c)(2) of the Revenue Act of 1921, which provides for nonrecognition of gain if “in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization;” However, Section 202(e), *supra*, is an exception to the exception, and to the extent applicable dictates that taxable gain shall be recognized. This is one of the so-called “boot” provisions, also found in all of the revenue acts since the Revenue

Act of 1921, clearly for the purpose of limiting the non-recognition of gain in technically reorganization type cases which also contain elements of sales rather than merely readjustment of corporate interests.

This Court has correctly observed that the "plan which was agreed upon and carried out in the instant case contemplated one group's ending up with control of the new corporation and the other group's getting an investment interest represented by preferred stock, at least part of which was under a sales-option contract to a third group." (Slip Op. 12.)

The plan of reorganization of Barker Delaware definitely provided for the receipt by the Lawrence Barker interests of cash in place of the entire \$2,087,000 first preferred shares to be issued to the Lawrence Barker interests. Said shares were sold for cash pursuant to the plan. The sale of said shares was not a separate step to be viewed apart from the reorganization itself. As this Court stated in its original opinion:

"Where, as here, the parties to a transaction formulated a plan which contemplated several steps to accomplish the end result, and bound themselves by contract to carry out the plan, the actions taken constitute a single transaction." (Slip Op. 11.)

Thus, even if the propositions advanced by appellee be hypothetically viewed as correct, the property received by the Lawrence Barker interests in exchange for their Barker California stock, insofar as it was temporarily represented by \$2,087,000 first preferred shares of Barker Delaware subject to the sales-option contract in favor of Bankers, consisted in reality of cash or its equivalent, not permitted to be received by them without recognition

of taxable gain. (*First Seattle Dexter Horton Nat. Bank, et al. v. Commissioner* (C. C. A. 9th, 1935), 77 F. 2d 45; *Henry Hudson v. Commissioner*, 39 B. T. A. 1075, 1094 (Acq. 1939-2 C. B. 18).) (See also Br. for Appellant 18-32; Reply Br. for Appellant 18-20.)

It is respectfully submitted, therefore, that if appellee's view of the case is correct, it is nevertheless true, as stated by the Court, in its original Opinion:

"In such circumstances, the parties to the transaction received substantially different property in exchange for their original holdings. Therefore a gain . . . was recognizable on the exchange at that time." (Slip Op. 12.)

As stated by the Court in *Banner Machine Co. v. Rout-sahn* (C. C. A. 6th, 1949), cert. den. 309 U. S. 676, 107 F. 2d 147, 149,

"It is true that . . . , stock was received; but the purpose to reduce that stock to cash was clearly shown by the giving of the option to the underwriter for the sale of the stock prior to the receipt thereof. Appellant in effect discounted the stock for cash."

Since the Lawrence Barker interests had recognizable gain from the exchange of their Barker California stock in 1923, even under appellee's view of this case, and since the basis of the Securities Company stock issued to the Lawrence Barker interests is the same as the basis of the assets transferred to the Securities Company for the issuance of its stock (Slip Op. 7), that basis must nevertheless be at least \$3,413,081.86, even if all of the statements averred by appellee be taken as correct. This follows from the application of the law discussed above to the facts of this case as will now be shown.

The basis of \$3,413,081.86 for the assets transferred to the Securities Company is arrived at as follows: (a) \$1,326,081.86, the basis of the Barker California shares owned by the Lawrence Barker interests [R. 32], plus \$2,087,000, the recognized taxable gain to the Lawrence Barker interests upon the exchange under the law applicable to 1923, minus \$2,087,000, the amount of money received; plus (b) \$2,087,000, the money received, which, however, was a part of the assets transferred to the Securities Company for the issuance of its stock.

Applying the foregoing, appellant's basis for his Securities Company stock becomes at least \$156.50 per share: \$235,031.57, appellant's basis for his Barker California stock [R. 32] plus \$469,847.77, which is $1841.50/8179.69$ of \$2,087,000 (appellant's share of the money received); or \$704,879.34; divided by 4504.13, which is the number of Securities Company shares issued to appellant [R. 28].

III.

The position contended for by appellant throughout this proceeding, namely, that the Lawrence Barker interests had recognizable gain from the exchange of their Barker California stock in 1923, clearly includes the lesser propositions set forth herein. Whether the ultimate decision in this case be that the recognized gain in 1923, (\$3,060,918.14), was the entire gain realized, resulting in a basis for appellant's Securities Company stock of \$219.35 per share; or was a portion thereof, \$2,087,000 (as set forth hereinabove), resulting in a basis for appellant's Securities Company stock of \$156.50 per share; the basic contention of appellant that gain was recognized upon the 1923 exchange is the same.

The foregoing was not discussed in the Brief for Appellant since that brief was limited to the questions decided by the lower court under Section 112(b)(5). Similarly, this was not discussed in the Reply Brief for Appellant since it did not appear to appellant's attorneys as relevant to the points argued by appellee in its Brief herein. The points made herein, however, it is respectfully submitted, are clearly appropriate to the pending disposition of this case by this Court if the Court should decide not to reinstate its original decision and to adhere to its view that this case is not governed by the *Groman* doctrine and the decisions involving reorganizations cited in the Reply Brief for Appellant on file herein. (*Starr v. Commissioner* (C. C. A. 4th, 1936), 82 F. 2d 964, 967, cert. den. 298 U. S. 680.)

Wherefore, appellant prays that this Honorable Court reinstate its original decision and reverse the decision of the District Court.

October, 1952.

Respectfully submitted,

IRELL & MANELLA,
LAWRENCE E. IRELL,
ARTHUR MANELLA,

Attorneys for Appellant.

No. 12827

United States
Court of Appeals
For the Ninth Circuit.

LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-
MOND KATZ, PHIL KATES, DOROTHY
KATES, ELY ELIAS, BERTHA ELIAS,
JULIAN ELIAS and WALTER L. KEEN,
Doing Business as LEE'S DEPARTMENT
STORE,

Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition for Review and Petition for
Enforcement of Order of National
Labor Relations Board

No. 12827

United States
Court of Appeals

For the Ninth Circuit.

LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-
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Doing Business as LEE'S DEPARTMENT
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorney for Respondent.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No.: 21-CA-420.

Date Filed: 3/30/49.

Compliance Status Checked by: DB.

1. Employer Against Whom Charge Is Brought.

Name of Employer: The Federal Stores.

Address of Establishment (Street and No., City, Zone and State): 720 South Broadway, Los Angeles, California.

No. of Workers Employed: Approx. 15.

Nature of Employer's Business: Retail Clothing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) subsections (1) and 8(a)(2) and 8(a)(3) of the National Labor Relations Act, and these unfair labor practices are unfair labor

practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets).

1. Employer has interfered with, restrained and coerced its employees at its store located at 720 South Broadway in the City of Los Angeles in the exercise of their rights to self organization and to determine a bargaining representative of their own choosing in violation of Section 8(a)(1).

2. Employer on and prior to March 29, 1949, has dominated, assisted and supported Amalgamated Clothing Workers of America, C.I.O., which is a labor organization within the meaning of Section 2(5) of the amended Act in violation of Section 8(a)(2) of the Act.

3. Employer has discriminatorily discharged employees for the purpose of encouraging membership in the Amalgamated Clothing Workers of America C.I.O., in violation of Section 8(a)(3). On or about March 29, 1949, employer discharged an employee, Murray Silverman, because he refused to sign an application for membership in said labor organization, and on that date also discharged at least one other employee because he objected to the check-off of union dues by the employer to be paid to the Amalgamated Clothing Workers Union.

3. Full Name of Labor Organization, Including

Local Name and Number, or Person Filing Charge:

Retail Clerks International Association, A.F. of L.

4. Address (Street and No., City, Zone, and State):
112 West Ninth Street, Los Angeles, California.
Telephone No. TUCKER 3844.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization).

6. Send copies of all papers to:

R. W. Gilbert, 117 W. 9th St., Los Angeles 15, California.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

RETAIL CLERKS INTERNATIONAL ASSOCIATION,

ROBERT W. GILBERT and

LOUIS A. NISSEN,

By /s/ LOUIS A. NISSEN,

Attorneys for Retail Clerks
Int'l Association.

Date: March 30, 1949.

Wilfully false statements on this charge can be

punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

[Admitted in evidence as General Counsel's Exhibit No. 1-A.]

Received March 30, 1949.

United States of America
National Labor Relations Board

FIRST AMENDED
CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No.: 21-CA-420.

Date Filed: 5/3/39.

Compliance Status Checked by: DB.

1. Employer Against Whom Charge Is Brought.

Name of Employer: The Federal Stores.

Address of Establishment (Street and No., City, Zone and State): 720 South Broadway, Los Angeles, California.

No. of Workers Employed: Approx. 15.

Nature of Employer's Business: Retail Clothing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and 8(a)(2) and 8(a)(3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets).

1. Employer has interfered with, restrained and coerced its employees at its store located at 720 South Broadway in the City of Los Angeles in the exercise of their rights to self organization and to determine a bargaining representative of their own choosing in violation of Section 8(a)(1).

2. Employer on and prior to March 29, 1949, has dominated, assisted and supported Amalgamated Clothing Workers of America, C.I.O., which is a labor organization within the meaning of Section 2(5) of the amended Act in violation of Section 8(a)(2) of the Act.

3. Employer has discriminated against employees by discharging said employees for the purpose of encouraging membership in the Amalgamated Clothing Workers of America, C.I.O., and for the further purpose of discouraging membership in the Retail Clerks International Association, A.F.L., in viola-

tion of Section 8(a)(3) of the Act. On or about March 29, 1949, employer discharged employee Murray Silverman, employee Nathan Schwartz, and on or about April 27, 1949, employer discharged employee Marie Faruzzi, because said employees refused to apply for membership in the Amalgamated Clothing Workers of America, C.I.O.

4. Employer has discriminated against employees as to terms and conditions of employment by transferring such employees to less desirable employment for the purpose of encouraging membership in the Amalgamated Clothing Workers of America, C.I.O.

(Continued on attached sheet)

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

Retail Clerks International Association, A.F.of L.

4. Address (Street and No., City, Zone, and State):
112 W. Ninth Street, Los Angeles, California.
Telephone No. TUCKER 3844.
5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization).
6. Send copies of all papers to:

R. W. Gilbert, 117 W. 9th St., Los Angeles 15, California.

Telephone No.: TUCKER 9266.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

RETAIL CLERKS INTERNATIONAL ASSOCIATION,

ROBERT W. GILBERT and

LOUIS A. NISSEN,

By /s/ ROBERT W. GILBERT,

Attorneys for Retail Clerks
Int'l Association.

Date: May 2, 1949.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

[Admitted in evidence as General Counsel's Exhibit No. 1-D.]

Received May 3, 1949.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate

or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No.: 21-CA-481.

Date Filed: 6/17/49.

Compliance Status Checked by: RF.

1. Employer Against Whom Charge Is Brought.

Name of Employer: Lee's Department Store.

Address of Establishment (Street and No., City, Zone and State): 6501 Pacific Boulevard, Huntington Park, California.

No. of Workers Employed: 60.

Nature of Employer's Business: Retail Merchandise.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and 8(a)(2) and 8(a)(3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc).

1. Employer has interfered with, restrained and coerced its employees at its store located at 6501

Pacific Boulevard, City of Huntington Park, California, in the exercise of their rights to self organization and to determine bargaining representative of their own choosing in violation of Section 8(a)(1).

2. Employer has dominated, assisted and supported Amalgamated Clothing Workers of America, C.I.O., which is a labor organization within the meaning of Section 2(5) of the amended Act in violation of Section 8(a)(2) of the Act.

3. Employer has discriminated against employees in regard to tenure of employment by discharging said employees for the purpose of discouraging membership in the Retail Clerks International Association, A. F. of L., and for the further purpose of encouraging membership in the Amalgamated Clothing Workers of America, C.I.O., in violation of Section 8(a)(3) of the Act. Employer discharged employee Myrtle Gray on or about May 28, 1949, and further discharged employee Maurice W. Jackson on or about May 15, 1949, because said employees had expressed a dislike for the Amalgamated Clothing Workers and were known to favor the Retail Clerks International Association.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

Retail Clerks International Association, A.F.of L.

4. Address (Street and No., City, Zone, and State):
112 West Ninth Street, Los Angeles, California.
Telephone No. TUCKER 3844.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization).
6. Send copies of all papers to:
Robert W. Gilbert, 117 W. 9th St., Los Angeles 15, California.
Telephone No. TUCKER 9266.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

RETAIL CLERKS INTERNATIONAL ASSOCIATION,

ROBERT W. GILBERT,

LOUIS A. NISSEN,

WILLIAM B. IRVIN,

By /s/ WILLIAM B. IRVIN,

Attorneys for Retail Clerks
Int'l Association.

Date: June 16, 1949.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

[Admitted in evidence as General Counsel's Exhibit No. 1-G.]

Received: June 17, 1949.

United States of America
Before the National Labor Relations Board,
Twenty-First Region

Case No. 21-CA-420

In the Matter of
FEDERAL STORES DIVISION OF SPEIGEL,
INC.

and

RETAIL CLERKS INTERNATIONAL ASSO-
CIATION, A. F. of L.

and

AMALGAMATED CLOTHING WORKERS OF
AMERICA, LOCAL UNION No. 81, CIO,
Party to the Contract.

Case No. 21-CA-481

In the Matter of
LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-
MOND KATZ, PHIL KATES, DOROTHY
KATES, ELY ELIAS, BERTHA ELIAS,
JULIAN ELIAS AND WALTER L. KEEN,
d/b/a LEE'S DEPARTMENT STORE,

and

RETAIL CLERKS INTERNATIONAL ASSO-
CIATION, A. F. of L.,

and

AMALGAMATED CLOTHING WORKERS OF
AMERICA, LOCAL UNION No. 81, CIO,
Party to the Contract.

CONSOLIDATED COMPLAINT

It having been charged by Retail Clerks International Association, A. F. of L., that the Federal Stores Division of Speigel, Inc., hereinafter referred to as Respondent Federal, and Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store, hereinafter referred to as Respondent Lee's, and each of them, have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101—80th Congress, First Session, hereinafter called the Act; and the General Counsel of the National Labor Relations Board, on behalf of the Board, having issued an Order of Consolidation, the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Consolidated Complaint and alleges as follows:

1. Respondent Federal Stores Division of Speigel, Inc., a corporation organized and existing by virtue of the laws of the State of Delaware, maintaining and operating stores in the States of California and Nevada, is now and at all times material herein, has been engaged in the department store business in the City of Los Angeles, California.

2. Respondent Federal, in the course and conduct of its business operations aforesaid, causes and

at all times herein material has caused large quantities and valuable amounts of equipment, materials, supplies and merchandise to be transported from and through states of the United States other than the State of California to its place of business in Los Angeles, California. During the calendar year ending December 31, 1949, said Respondent Federal purchased equipment, materials, supplies and merchandise valued at approximately \$3,000,000, of which sum 50 per cent of the dollar value of such equipment, materials, supplies and merchandise was shipped directly to it from points outside the State of California. During the same period, said Respondent Federal has caused large quantities of merchandise to be sold and transported in interstate commerce from its aforementioned department stores into and through states of the United States other than the State of California.

3. Respondent Leo Katz, Minda Katz, Otto Katz, Leomond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store, a copartnership with its principal place of business in Huntington Park, California, is now and at all times material herein has been engaged in the department store business in Huntington Park, California.

4. Respondent Lee's, in the course and conduct of its business operations aforesaid, causes and at all times material herein has caused large quantities and valuable amounts of equipment, materials, supplies and merchandise to be transported from and

through states of the United States other than the State of California to its place of business in Huntington Park, California. During the 12-month period ending November 24, 1948, Respondent Lee's purchased equipment, materials, supplies and merchandise valued at approximately \$1,000,000, of which sum 30 per cent of the dollar value of such equipment, materials, supplies and merchandise was shipped directly to it from points outside the State of California.

5. Respondent Federal is and at all times material herein has been engaged in commerce within the meaning of the Act.

6. Respondent Lee's is and at all times material herein has been engaged in commerce within the meaning of the Act.

7. Retail Clerks International Association, A. F. of L., is a labor organization within the meaning of Section 2, subsection (5) of the Act.

The Amalgamated Clothing Workers of America, Local Union No. 81, CIO, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

8. Respondent Federal and Respondent Lee's, by their officers, agents and employees while engaged in their business as described in paragraphs 1, 2, 3 and 4, above, on or about December 17, 1948, entered into a joint, written, exclusive collective bargaining agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO,

covering wages, rates of pay, hours of employment and other conditions of employment of Respondent Federal's and Respondent Lee's employees: which agreement provided, in part, as follows:

“Article V. Membership in Union

“1. Members of the Employers' families, store managers, one head bookkeeper, one stenographer-secretary, and bona fide department heads who have the duty of directing the work of two or more employees in their respective departments, shall not be subject to the jurisdiction of the Union and shall be excepted from all provisions of this agreement.

“2. Subject to the exceptions specified in paragraph 1, of this Article, all full-time employees at present employed in the classifications specified in Article II, shall become members of the signatory Union within fifteen (15) days after the effective date of this agreement or shall be discharged by the Employer.

“3. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees in the classifications specified in Article II, and who are hired after the effective date of this agreement shall become members of the signatory Union within 30 days after the date of their employment or shall be discharged by the Employer.”

At all times since on or about December 17, 1948, Respondent Federal, Respondent Lee's and Amalga-

mated Clothing Workers of America, Local Union No. 81, CIO, have enforced and given effect to said agreement and all renewals and extensions thereof and have required membership in the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as a condition of employment.

9. At all times since on or about October 30, 1948, Respondent Federal and Respondent Lee's have interfered with, restrained, coerced and deprived their respective employees of their rights by deducting from the pay of their respective employees monthly union dues without the written authorization or consent of their respective employees.

10. Respondent Federal, by its officers, agents and employees, did discharge Mandel Silverman and Nathan Schwartz on or about March 29, 1949; and Marie Faruzzi on or about April 27, 1949, and each of them, and at all times since has refused and failed and does now refuse and fail to re-employ them, and each of them, for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection and because they refused to permit the employer to deduct union dues from their compensation.

11. Respondent Lee's, by its officers, agents and employees, did discharge Maurice W. Jackson on or about May 15, 1949, and at all times since has refused and failed and does now refuse and fail to reemploy him for the reason that he engaged in concerted activities with other employees for the pur-

poses of collective bargaining and other mutual aid and protection.

12. The aforesaid agreement entered into between Respondent Federal, Respondent Lee's and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, and all renewals and extensions thereof, by reason of the allegations set forth in paragraph 8 hereof, and by reason that no union authorization election in accordance with Section 9 (e) of the Act has been held, is illegal and invalid.

13. Respondent Federal, while engaged in its business as described above, by its officers, agents and employees has since on or about October 30, 1948, interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act by various acts and statements including, without limitation, the following:

(a) Attempting to influence its employees against their free choice of union affiliation;

(b) Urging, persuading and warning its employees not to become or remain members of the A. F. of L.;

(c) Demanding that its employees become and remain members of the Amalgamated Clothing Workers of America;

(d) Threatening to discharge its employees if they should refuse to submit to dues check-off in favor of the Amalgamated Clothing Workers of America; and

(e) By requiring its employees to become members of the Amalgamated Clothing Workers of America against said employees' will.

14. By the acts and conduct set forth in paragraphs 8 and 9 hereof, Respondent Federal and Respondent Lee's have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3) of the Act.

15. By the acts and conduct set forth in paragraph 10 hereof, Respondent Federal has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (3) of the Act.

16. By the acts and conduct set forth in paragraph 11 hereof, Respondent Lee's has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (3) of the Act.

17. By the acts and conduct set forth and described in paragraph 13 hereof, and by each of said acts, Respondent Federal has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act and Respondent Federal did thereby engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

18. The activities of Respondent Federal and Respondent Lee's herein, as set forth in paragraphs 8 through 13 hereof, occurring in connection with the business of Respondent Federal and Respondent Lee's described in paragraphs 1 through 4 hereof,

have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

19. The aforesaid acts of Respondent Federal and Respondent Lee's, and each of them, as set forth in paragraphs 8 through 13 hereof, constitute unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3); and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 31st day of January, 1950, issues this Consolidated Complaint against the named Respondents, and each of them.

/s/ HOWARD F. LeBARON,

Regional Director, National Labor Relations Board,
Twenty-First Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-J.]

United States of America
Before the National Labor Relations Board,
Twenty-First Region

[Title of Causes.]

ORDER CONSOLIDATING CASES AND
NOTICE OF HEARING

The General Counsel for the National Labor Relations Board, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the National Labor Relations Act, as amended, and to avoid unnecessary costs or delay,

Hereby Orders, pursuant to Section 203.64 (b) of National Labor Relations Board Rules and Regulations—Series 5, that these cases be, and they hereby are, consolidated.

Please Take Notice that on the 7th day of March, 1950, at 10:00 a.m., at Suite 607-13, Hearing Room No. 1, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Copies of the Charges and Amended Charges upon which the Consolidated Complaint is based are attached hereto.

You are further notified that, pursuant to Section 203.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor

Relations Board, an answer to the said Consolidated Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Consolidated Complaint shall be deemed to be admitted as true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Consolidated Complaint and Order Consolidating Cases and Notice of Hearing to be signed by the Regional Director for the Twenty-First Region on this 31st day of January, 1950.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board,
Twenty-First Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-K.]

Law Offices
Lowenthal & Elias
633 Roosevelt Building
Los Angeles 14, California

February 9, 1950

Mr. Howard F. LeBaron, Regional Director
National Labor Relations Board
111 West Seventh Street
Los Angeles 14, California

Re: Leo Katz, et al., dba Lee's Department Store, and Retail Clerks International Association, A. F. of L., and Amalgamated Clothing Workers of America, Local Union No. 81, CIO—Case No. 21-CA-481 (Consolidated with Case No. 21-CA-420).

Dear Mr. LeBaron:

I am writing to you on behalf of my client Lee's Department Store, one of the parties in the above proceeding.

The order consolidating cases and notice of hearing, together with consolidated complaint, which was served on my client on or about February 1, 1950, has just been placed in my hands.

I am in the process of moving my office and will not have an opportunity to prepare and file a responsive pleading within the time specified in the notice.

I discussed this matter with your office and was advised to make this written request to you for an

extension of the time within which to file an answer to the complaint.

Accordingly, I hereby respectfully request that I be allowed to and including the 24th day of February, 1950, within which to file an answer on behalf of my client Lee's Department Store.

Your consideration in granting this request will be greatly appreciated.

Yours very truly,

/s/ T. J. ELIAS.

TJE:am

[Admitted in evidence as General Counsel's Exhibit No. 1-M.]

Received February 10, 1950.

United State of America
Before the National Labor Relations Board,
Twenty-First Region

[Title of Causes.]

ORDER EXTENDING TIME FOR FILING
ANSWER TO CONSOLIDATED COMPLAINT

On motion of Attorney for Lee's Department Store, and for proper cause shown, it is hereby ordered that the time for filing answer to the Consolidated Complaint be, and it hereby is, extended to February 24, 1950.

Dated at Los Angeles, California, this 13th day of February, 1950.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board,
Twenty-First Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-N.]

United States of America
Before the National Labor Relations Board,
Twenty-First Region

[Title of Causes.]

ANSWER OF LEE'S DEPARTMENT STORE
TO CONSOLIDATED COMPLAINT

Come Now, Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store (herein referred to as Lee's Department Store), and for themselves alone and not for any other party to the above-consolidated actions, do hereby answer the consolidated complaint on file herein, and admit, deny and allege, as follows:

1. Admit the allegations contained in Paragraphs 3, 4 and 8 of said consolidated complaint.
2. Deny generally and specifically each and all of the allegations contained in Paragraphs 6, 9, 11,

12, 14, 16, 18 and 19 of said consolidated complaint, and the whole of said paragraphs.

3. For want of information or belief, deny generally and specifically each and all of the allegations contained in Paragraphs 1, 2, 5, 7, 10, 13, 15 and 17, and the whole of said paragraphs.

4. Deny generally and specifically each and all of the allegations contained in the document entitled "Charge against Employer" appended to said consolidated complaint and in which Lee's Department Store is named as Employer.

THEODORE J. ELIAS, and
HAROLD EASTON,

By /s/ THEODORE J. ELIAS,
Attorneys for Lee's
Department Store.

State of California,
County of Los Angeles—ss.

Walter Keen, being by me first duly sworn, deposes and says:

That he is one of the partners of Lee's Department Store and is one of the parties in the foregoing answer to consolidated complaint; That he has read the foregoing answer to consolidated complaint and knows the contents thereof, and that the same is true as to his own knowledge, except as to the matters that are stated on his information and belief, and as to those matters that he believes it to be true.

/s/ WALTER KEEN.

Subscribed and sworn to before me this 23rd day of February, 1950.

[Seal] /s/ HELEN HARDEN,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Admitted in evidence as General Counsel's Exhibit No. 1-P.]

Received February 24, 1950.

United States of America
Before the National Labor Relations Board,
Twenty-First Region

[Title of Causes.]

AMENDMENT TO CONSOLIDATED COMPLAINT

Pursuant to authority granted by Section 203.17 of the Board's Rules and Regulations, Series 5, the Consolidated Complaint heretofore issued on January 31, 1950, is hereby amended by adding the following paragraph numbered 6 (a) :

6 (a). Respondent Federal and Respondent Lee's are members of Credit Stores Association which, on behalf of all its members, did enter into the contract described in paragraph 8 of the Consolidated Complaint. The members of Credit Stores Association, including Brown's, Star Outfitting Co.,

Federal Stores, Golden State Dept. Store, Kay's Department Stores, and Lee's Dept. Store, caused and continuously have caused large quantities and valuable amounts of merchandise to move in commerce within the meaning of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 28th day of February, 1950, issues this Amendment to Consolidated Complaint.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director National Labor Relations Board,
Twenty-First Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-R.]

United States of America
Before the National Labor Relations Board,
Twenty-First Region

[Title of Causes.]

AMENDED ANSWER OF LEE'S DEPARTMENT STORE TO CONSOLIDATED COMPLAINT, AS AMENDED

Come Now, Leo Katz, Minda Katz, Otto Katz, Leomond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, doing business as Lee's Department Store (hereinafter referred to as "Respondent Lee's"),

pursuant to Section 102.23 of the Rules and Regulations—Series 5 of the Board, and for themselves alone and not for any other party to the above-consolidated proceedings, do hereby answer the consolidated complaint on file herein, as amended, and admit, deny, and allege as follows:

(1) Admit the allegations of paragraph 3.

(2) Admit the allegations in paragraph 4 that during the twelve-month period ending November 24, 1948, Respondent Lee's purchased equipment, materials, supplies and merchandise valued at approximately \$1,000,000, of which sum thirty per cent of the dollar value of such equipment, materials, supplies and merchandise Respondent Lee's, in the course and conduct of its business operations, caused to be transported and shipped from and through States of the United States other than the State of California directly to its place of business in Huntington Park, California. Deny each and every other and remaining allegation in said paragraph 4.

(3) Deny that the agreement referred to in paragraph 8 was a "joint" agreement, and in this connection allege that Respondent Lee's entered into and executed said agreement as a separate and individual party and that Article XI of said agreement provides:

"It is understood that this agreement is executed by the Employers severally, and that no signatory Employer shall be liable for any breach of this agreement by any other Employer

and that no default or breach by any Employer shall constitute a default or breach by any other Employer.”

Admit the remaining allegations of said paragraph 8.

(4) Admit the allegation in paragraph 9 that since October 30, 1948, Respondent Lee's has, with some exceptions, deducted from the pay of its respective employees monthly union dues without the written authorization of such employees. Deny each and every other and remaining allegation in said paragraph 9.

(5) Admit that Respondent Lee's did discharge Maurice W. Jackson on or about May 15, 1949, as alleged in paragraph 11. Deny each and every other and remaining allegation in said paragraph 11.

(6) Admit, as alleged in paragraph 12, that no union authorization election in accordance with Section 9(e) of the Act has been held. Deny each and every other and remaining allegation in said paragraph 12.

(7) For lack of knowledge concerning said allegations, deny generally and specifically each and all of the allegations contained in paragraphs 1, 2, 5, 7, 10, 13, 15, and 17, and the whole of each of said paragraphs.

(8) Deny generally and specifically each and all of the allegations contained in paragraphs 6, 6(a), 14, 16, 18, and 19, and the whole of each of said paragraphs.

For a Second, Separate and Distinct Defense to said consolidated complaint as amended, and to the whole thereof, excepting only the unfair labor practice alleged in paragraphs 11 and 16, Respondent Lee's alleges:

(1) The unfair labor practices charged occurred, if at all, on December 17, 1948, when Respondent Lee's entered into the written collective bargaining agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, referred to in paragraph 8 of the complaint herein. The charge forming the basis of the complaint issued herein was not filed with the National Labor Relations Board until June 17, 1949, and was not served on Respondent Lee's until on or after June 21, 1950.

(2) Said charges of unfair labor practice are, therefore, barred by the six months period of limitations specified in the proviso in Section 10(b) of the National Labor Relations Act.

Wherefore, Respondent Lee's prays that the General Counsel take nothing by reason of his complaint herein, and that the same be dismissed forthwith.

Dated: March 7, 1950.

LATHAM & WATKINS,

THEODORE J. ELIAS,

HAROLD EASTON,

By /s/ R. W. LUND,

Attorneys for Respondent Lee's, located at 6501
Pacific Blvd., Huntington Park, California.

State of California,
County of Los Angeles—ss.

Walter Keen, being by me first duly sworn, deposes and says:

That he is one of the partners of Lee's Department Store and is one of the parties to the foregoing proceeding; that he has read the foregoing Amended Answer of Lee's Department Store to Consolidated Complaint, as Amended, and knows the contents thereof; that the same is true to his own knowledge.

/s/ WALTER KEEN.

Subscribed and sworn to before me this .. day
of March, 1950.

.....

Notary Public in and for the County of Los Angeles,
State of California.

[Admitted in evidence as General Counsel's Exhibit No. 1-U.]

United States of America
Before the National Labor Relations Board,
Division of Trial Examiners, Washington, D. C.

[Title of Causes.]

GEORGE H. O'BRIEN,

For the General Counsel,

JESSE H. STEINHART, by

S. A. LADAR,

Of San Francisco, Calif.,

For the Respondent Federal.

LATHAM & WATKINS,

THEODORE J. ELIAS, and

HAROLD EASTON, by

RICHARD W. LUND,

Of Los Angeles, Calif.,

For the Respondent Lee's.

GILBERT, NISSEN & IRVIN, by

ROBERT W. GILBERT, and

WILLIAM B. IRVIN,

Of Los Angeles, Calif.,

For the Retail Clerks.

WIRIN, OKRAND & RISSMAN, by

ROBERT R. RISSMAN,

Of Los Angeles, Calif.,

For the Amalgamated.

INTERMEDIATE REPORT

Statement of the Case

Upon a first amended charge duly filed on May 2, 1949, and another charge duly filed on June 16, 1949, by Retail Clerks International Association, A. F. of L., herein called the Retail Clerks, the General Counsel of the National Labor Relations Board,¹ by the Regional Director for the Twenty-first Region (Los Angeles, California), issued a consolidated complaint dated January 31, 1950, against Federal Stores Division of Speigel, Inc., of Los Angeles, California, herein called the Respondent Federal, and Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, d/b/a Lee's Department Store, of Huntington Park, California, herein called the Respondent Lee's. The complaint alleges that the respondent Federal and the Respondent Lee's had engaged and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1); (2), and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. Copies of the complaint, the respective charges, and notice of hearing were duly served upon the Respondent Federal, the Respondent Lee's, the Retail Clerks, and the Amalgamated Clothing

¹The General Counsel and the attorney representing him at the hearing are herein referred to as the General Counsel; the National Labor Relations Board as the Board.

Workers of America, Local Union No. 81, CIO, herein called the Amalgamated.

With respect to the unfair labor practices the complaint alleges in substance: (1) that the Respondent Federal and the Respondent Lee's are each engaged in commerce within the meaning of the Act; (2) that on or about December 17, 1948, the Respondent Federal and the Respondent Lee's entered into a joint written collective bargaining contract with the Amalgamated, containing a union-shop clause which has not been authorized by an election pursuant to Section 9 (e) of the Act; (3) that at all times since the execution of the aforesaid contract, both the Respondents have enforced the contract and have required membership in the Amalgamated as a condition of employment; (4) that at all times since on or about October 30, 1948, both the Respondents have deducted Amalgamated dues from the pay of their respective employees without the written consent of such employees; (5) that the Respondent Federal discharged employees Mandel Silverman and Nathan Schwartz on March 29, 1949, and Marie Faruzzi on April 27, 1949, and the Respondent Lee's discharged employee Maurice W. Jackson on May 15, 1949, and have since refused to reinstate them, because these employees had engaged in concerted activities with other employees and because they refused to permit their Employers to deduct union dues from their pay. In their respective answers, duly filed, both the Respondents deny that they are engaged in commerce within the meaning of the Act, or that they have engaged in any

of the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held on March 7 and 8, 1950, in Los Angeles, California, before the undersigned Trial Examiner. All of the parties were represented by counsel, who were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertaining to the issues. At the opening of the hearing counsel for the Respondent Lee's made motions to sever the cases herein consolidated for purpose of hearing, to dismiss the complaint in its entirety on the ground of nonjoinder of an indispensable party (the Amalgamated), and to strike various paragraphs of the complaint, or in the alternative, to dismiss the entire complaint. These motions were denied.² Permission was granted to the Respondent Lee's to file an amended answer and to the Respondent Federal orally to amend its answer on the record. At later stages of the hearing, counsel for the Respondent Lee's renewed his motions to strike

²The cases at bar were properly ordered consolidated for purposes of hearing and no prejudice is shown to have resulted to any of the parties. I am therefore of the opinion that the motion to sever was properly denied. See *Seamprufe, Inc.*, 82 NLRB 892, footnote 4.

I find no merit in the contention that the Amalgamated is an indispensable party respondent to this proceeding, and that, since it was not so joined herein, the complaint should be dismissed. Cf. *General Electric X-Ray Corporation*, 76 NLRB 64, 66-67; *Durasteel Company*, 73 NLRB 941, 946; and see the specific language in *E. L. Bruce Company*, 75 NLRB 522, at 526, dealing with this issue.

various paragraphs of the complaint. Rulings on these motions, as renewed, were reserved.

One of the aforesaid motions to strike, which was joined in by counsel for the Respondent Federal and the Amalgamated, was addressed to paragraph 9 of the Complaint, which alleges that both Respondents had "interfered with, restrained, coerced and deprived their respective employees of their rights by deducting from the pay of their respective employees monthly union dues without the written authorization or consent of their respective employees."³ The motion to strike the foregoing paragraph of the complaint was accompanied by a motion to strike all testimony taken during the hearing on the issue raised thereby. In support of these motions counsel argue that a violation of Section 302 of the Act⁴ does not per se constitute the commission of an unfair labor practice, and that consequently, it adds nothing to the complaint to allege such an unauthorized check-off even in connection with the enforcement of an illegal union-shop clause in a contract. They cite as authority for this con-

³It is admitted by both Respondents that during the period herein material they deducted union dues from the pay of at least some of their respective employees, and remitted such dues to the Amalgamated, without such "check off" having been authorized in writing by the employees so affected.

⁴Section 302 makes it a misdemeanor for an employer wilfully to withhold union dues from the pay of employees without having been authorized to do so in writing by each employee on whose account such deductions are made.

tention the Board's decision in *Salant & Salant, Inc.*, 88 NLRB No. 156. The General Counsel contends that the unauthorized check-off of union dues by the Respondents amounted to "an act of assistance (to the Amalgamated) independent of the language of Section 302 of the Act." In any event, he argues further, "the checking off of dues in violation of Section 302 when joined with an unlawful union shop provision is violative of Sections 8 (a) (1) and (2) of the Act. Compelled membership plus compelled check-off reinforce each other to assist and support the Union." (Underlineation in original; brief of General Counsel, p. 15.)

For reasons which will appear below in connection with my discussion of this matter, the motions to strike paragraph 9, and all evidence received in support thereof, are hereby denied. The issue with respect to the check-off of Amalgamated dues from the pay of the Respondents' employees will be dealt with on its merits.

In addition to the motions above disposed of, counsel for the Respondent Lee's, at the conclusion of the hearing, renewed a motion to strike from the complaint paragraphs 7, 8, 9, 12, and 14, and the reference in paragraph 19 to Section 8 (a) (2) of the Act. Ruling was reserved thereon. In sum, the motion goes to all portions of the complaint which allege that the Respondent Lee's committed unfair labor practices by entering into and enforcing the union-shop clause in its contract with the Amalgamated. The motion is based on the contention that, as to the Respondent Lee's, these allegations are

outlawed by the limitation contained in Section 10 (b) of the Act with respect to the issuance of a complaint based upon unfair labor practices occurring more than 6 months prior to the filing and service of a charge. The facts material to this issue are as follow: The contract containing the union-shop clause herein complained of was executed on December 17, 1948, and as is undisputed, was thereafter enforced by the parties at all times alleged in the complaint. A charge that the Respondent Lee's committed unfair labor practices by illegally assisting the Amalgamated was filed by the Retail Clerks on June 17, 1949, and was served upon the Respondent Lee's on June 21, 1949.

Counsel for the Respondent Lee's contends that the 6-month period referred to in Section 10 (b) began to run on December 17, 1948, when the contract was executed, and expired on June 17, 1949, 4 days prior to the date (June 21) when the charge was served on it. Consequently, he argues, any allegation that the Respondent Lee's committed unfair labor practices by entering into and enforcing the alleged illegal contract, is barred by the statute.

The General Counsel concedes that no finding of unfair labor practices by the Respondent Lee's may be predicated on the execution of the contract by that Respondent, since the contract was signed more than 6 months prior to the service of the charge upon said Respondent. He urges, however, that the Respondent Lee's admitted continued enforcement of the illegal union-security clause, which occurred within the 6-month period, constituted unfair labor

practices with respect to which findings may properly be made.

In support of his contentions, counsel for the Respondent Lee's cites the Board decision in Goodall Company, 86 NLRB No. 127. One of the issues in that case was the alleged grant of a wage increase by the employer to the employees in order to discourage membership in a union. The wage increase in question was made effective more than 6 months prior to the filing and service of the charge which instituted the proceeding. The Trial Examiner recommended dismissal of the allegation that the employer's aforesaid conduct constituted an unfair labor practice, on the ground that the statute of limitations embodied in Section 10 (b) of the Act barred the issuance of a complaint based on the wage increase. In so doing, the Trial Examiner considered and rejected the theory that the employer's continued payment of the wage increase during a period less than 6 months prior to the filing of the charge, might be deemed to constitute a continuing violation of the Act which could validly be alleged and found. No exceptions were filed to the foregoing recommendation of the Trial Examiner, and the Board, pursuant to its usual practice, adopted it, without thereby indicating whether or not it agreed with either the reasoning of the Trial Examiner or the result reached.⁵ It is plain, therefore, that

⁵Cf. Gulfport Transport Company, 84 N.L.R.B. No. 71, footnote 3, wherein the Board explicitly stated its disagreement with the Trial Examiner on a certain issue, but nevertheless refrained from reversing him on the point because no exception had been filed with respect thereto.

the Goodall decision is not a binding precedent on the point here in issue. In any event, the alleged violation of the Act treated in the Goodall case is essentially different from that here encountered. There the unfair labor practice alleged was the granting of a wage increase under circumstances which indicated that the increase was put into effect in order to forestall a union organizational campaign. The gravamen of such an unfair labor practice lies in the timing of the grant and announcement of the wage increase, not in its subsequent payment. The critical interference with the rights of employees takes place when, coincidentally with the organizational campaign, benefits are extended to the employees in order to induce them to refrain from organizing. That the continued payment of such a wage increase is not deemed to constitute an unfair labor practice is clearly indicated by the fact that the Board's customary remedy in such cases does not provide for a rescission of the wage increase.⁶

In the present case, the alleged unfair labor practices consist of the execution and subsequent enforcement of an illegal contract requiring membership in the contracting union as a condition of employment. Obviously, the rights of employees are just as seriously violated by the continued enforcement of that requirement as by its initiation. In

⁶See, for example, Williamson-Dickie Mfg. Co., 35 N.L.R.B. 1220; Fitzpatrick and Weller, Inc., 46 N.L.R.B. 28; Mellin-Quincy Mfg. Co., Inc., 53 N.L.R.B. 366.

other words, unfair labor practices are committed not only at the time such an illegal contract is entered into, but at all subsequent times when it is enforced, or even permitted to continue to exist.⁷ In recognition of this fact, the Board's remedial order, when such unfair labor practices are found, requires that the contract be set aside, and that recognition be withdrawn from the contracting union whose representative status was wrongfully strengthened by virtue of the illegal contract.⁸

The issue here being considered is analogous to that which arises when a contract lawful when entered into is kept in operation after some of its provisions have been declared illegal by subsequent statutory enactment, or when a strike legally called is continued after being prohibited by subsequent legislation. In such cases the Courts have held that the continuance in effect, respectively, of the contract and the strike, constituted violations of the statutes in question.⁹

⁷In this case, the Respondent Lee's admittedly enforced the union-shop clause in the contract subsequent to its execution. The Board has held that even where such an illegal clause has not been enforced, its "mere existence" acts as a restraint upon those employees who might not wish to join the contracting union. *Julius Resnick, Inc.*, 86 N.L.R.B. 38; *Hager and Sons Hinge Mfg. Co.*, 80 N.L.R.B. 136.

⁸*Julius Resnick case, supra.*

⁹See *N.L.R.B. v. Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.*, U. S. Court of Appeals for the Sixth Circuit, case

I am persuaded that although the statute of limitations set forth in Section 10(b) of the Act precludes any finding of unfair labor practices predicated on the Respondent Lee's execution of the contract with the Amalgamated, the continued enforcement of the aforesaid contract during a period less than 6 months prior to the service of the charge on the Respondent Lee's, constituted conduct on its part which may properly be found to have resulted in unfair labor practices. The Respondent Lee's motion to strike paragraphs 7, 8, 9, 12, and 14, and so much of paragraph 19 as refers to Section 8(a)(2) of the Act, from the complaint, is therefore denied.

Motions were also made at the close of the hearing by counsel for the Respondents Lee's and Federal and for the Amalgamated to dismiss the complaint on jurisdictional grounds. Ruling on these motions was reserved. The aforesaid motions are disposed of by the findings, conclusions, and recommendations hereinafter made.

During the hearing the General Counsel stated his inability to offer evidence at that time in support of paragraph 11 of the complaint, which alleges that the Respondent Lee's discharge of employee Maurice W. Jackson constituted an unfair labor practice. He moved to dismiss the aforesaid allegation without prejudice. This motion was denied, and the motion thereupon made by counsel

number 10943, decided April 4, 1950; and *United States v. Freight Association*, 166 U. S. 290, cited in that opinion.

for the Respondent Lee's to dismiss the aforesaid allegation was granted.

Following the testimony of the witness, Marie Faruzzi, counsel for the Respondent Federal moved to dismiss paragraph 10 of the complaint insofar as that paragraph alleges that Faruzzi was discharged on or about April 27, 1949, in contravention of the Act. This motion was denied. A motion by the General Counsel to amend paragraph 10 of the complaint by substituting "sometime in March, 1949," for "on or about April 27, 1949," as the date of Faruzzi's alleged discriminatory discharge, was granted.¹⁰

At the conclusion of the hearing the General Counsel's motion to conform the pleadings to the proof with respect to such formal matters as dates and the spelling of names was granted without objection.

The parties were afforded opportunity to present oral argument at the close of the hearing, and to submit briefs and proposed findings of fact and conclusions of law. Oral argument was waived, in lieu of which the Trial Examiner informally discussed the issues on the record with counsel. Briefs have been received from counsel for the General Counsel, the Respondents Lee's and Federal, and the Retail Clerks.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

¹⁰The issue of Faruzzi's discharge is discussed in a succeeding section of this Intermediate Report.

Findings of Fact

I. The Business of the Respondents

The Respondent Federal Stores Division of Spiegel, Inc., is, as its name implies, a division of Spiegel, Inc., a Delaware corporation which has offices in Chicago, Illinois. That corporation directly operates under its own name a chain of department stores throughout the United States. It also owns the "autonomous" chain of retail department stores herein named as Federal Stores Division of Spiegel, Inc. This chain consists of 20 stores, of which 19 are located in the State of California and 1 in the State of Nevada. These stores are operated for Spiegel, Inc., under an arrangement whereby the management of the Federal chain is centralized in an executive employed for that purpose on a contract basis.¹¹ This executive has full charge of all phases of the operations of the stores comprising that chain, and they are operated under his direction as an integrated entity, independent of the administration of the stores directly operated by the owning corporation.

In the operations of the aforesaid chain, the Respondent Federal annually purchases merchandise valued at approximately \$3,000,000, of which about 45 per cent originates from points outside the States of California and Nevada. Approximately 25 per cent of its annual purchases is bought

¹¹That is, the executive who operates the Federal chain is compensated by a share of the profits produced thereby.

in, and shipped to it, from points outside these States; about 20 per cent is purchased from jobbers in the State of California, but was manufactured outside California and Nevada. Practically all of the merchandise purchased and sold by the Federal stores is initially shipped to and warehoused in San Francisco, California, where its principal offices and warehouse are located, from where it is distributed, upon requisition, to the various department stores comprising the chain. Practically all of the merchandise sold by the individual stores is sold locally at retail. The total volume of retail sales of the chain amounts annually to approximately \$6,000,000, of which about 80 per cent is sold on credit.¹²

Among the stores operated by the Respondent Federal are two located in Los Angeles, California, and one in a suburb of that city, Huntington Park, California. The employees of these three stores are covered by the contract with the Amalgamated which is here in question. The Respondent Federal annually purchases merchandise for sale at these three stores valued at from \$250,000 to \$325,000.¹³

Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias,

¹²The foregoing data as to the Respondent Federal's annual volume of purchases and sales, and the percentages above set forth, apply to the year 1949.

¹³The annual volume of sales made by the Respondent Federal's Nevada store amounts to approximately \$250,000-\$500,000.

Julian Elias, and Walter L. Keen are copartners doing business as Lee's Department Store at Huntington Park, California. They operate a retail department store in that city which sells men's, women's and children's apparel, jewelry, housewares, shoes, furniture, and appliances. Approximately 60 full-time employees are employed by the Respondent Lee's in its said store.

During the year ending November 24, 1948, the Respondent Lee's purchased equipment, materials, supplies, and merchandise valued at approximately \$1,000,000, of which 30 per cent was shipped to it from points outside the State of California. Its sales are wholly within that State. About 70-75 per cent of its sales are on a credit basis.

Both the Respondent Federal and the Respondent Lee's deny the allegations of the complaint that they are engaged in commerce within the meaning of the Act, and each urges that in any event the business in which it is engaged is essentially of such a local nature that the Board should not assert jurisdiction over it.

The substantial volume of merchandise purchased by each of these Respondents and shipped to it across State lines in itself clearly brings both of them under the jurisdiction of the Board.¹⁴ The question which remains is whether the Board, in its

¹⁴N.L.R.B. v. Fainblatt, 306 U. S. 601; N.L.R.B. v. Bradford Dyeing Assoc., 310 U. S. 318; N.L.R.B. v. Van De Kamp's Holland-Dutch Bakers, Inc., 152 F. 2d 818 (C.A. 9); J. L. Brandeis & Sons v. N.L.R.B., 142 F. 2d 977 (C.A. 8); N.L.R.B. v. McGough Bakeries Corp., 153 F. 2d 420 (C.A. 5).

discretion, should assert the jurisdiction which it undoubtedly has over these Respondents. In his brief; counsel for the Respondent Lee's argues that the business operated by it, being "a typical small retail department store in a small community, * * * is the usual local business over which the Board regularly declines to assert jurisdiction." He cites a number of cases in which the Board has refused to take jurisdiction over business enterprises which made interstate purchases of materials and merchandise comparable in volume to that shipped to the Respondent Lee's. None of the cases cited, however, involved department stores. Counsel recognizes "that the Board has taken jurisdiction over some department stores," but contends that this has been in cases involving nation-wide chains of such stores, or where the department stores in question have made "substantial out-of-state mail order sales, or where they are of such size that their volume of business necessarily must affect interstate commerce to a great degree." Contrary to counsel's contentions, the Board has asserted jurisdiction over "small" department stores which make no out-of-state sales, and the volume of whose out-of-state purchases is even less than that shipped to the Respondent Lee's.¹⁵ In any event, the Board's

¹⁵E.g., *The P. B. Magrane Store, Inc.*, 84 N.L.R.B. No. 43 (one retail department store; total annual sales, \$770,000, all intrastate; total annual purchases, \$524,000, over 50 per cent of which obtained out-of-state); *Parks-Belk Co.*, 77 N.L.R.B. 429 (one retail store; total sales, all intrastate, \$250,000; total purchases, \$175,000, about 50 per cent of which was interstate).

practice is to assert jurisdiction over department stores to which a substantial volume of merchandise is shipped across State lines, even where the stores involved make all or substantially all of their sales within the State in which they are located.¹⁶

On the basis of the foregoing, I conclude and find that the Respondent Lee's and the Respondent Federal¹⁷ are both engaged in commerce within the meaning of the Act, and recommend that, "consistent with Board practice with respect to department stores, * * * jurisdiction should be exercised [over both Respondents] in this case."¹⁸

The General Counsel urges as an additional reason why the Board should exercise its jurisdiction over both the Respondents herein, the circumstance that they, together with other operators of retail stores, are parties to a collective bargaining contract with the Amalgamated covering a bargaining unit consisting of all the employees of the employer-signatories of the said contract. The aforesaid contract, which was entered into on December 17, 1948,

¹⁶Whitney's Department Store, 73 N.L.R.B. 1245; May Department Store Co., 71 N.L.R.B. 1214; J. L. Brandeis & Sons, 50 N.L.R.B. 325, 47 N.L.R.B. 614, 53 N.L.R.B. 352; M. E. Blatt Co., 38 N.L.R.B. 1210; Loveman, Joseph & Loeb, 56 N.L.R.B. 752; Block and Kuhl Department Store, 83 N.L.R.B. No. 63.

¹⁷The foregoing discussion applies with even more force to the Respondent Federal, which operates a chain of department stores across State lines, than to the Respondent Lee's.

¹⁸The P. B. Magrane Store, Inc., *supra*.

was purportedly executed "by and between signatory members of Credit Stores Association * * * as parties of the First Part, and [the Amalgamated], party of the Second Part," and provides for rates of pay and other terms and conditions of employment to apply to all of the employees of the six employers (including the two Respondents herein) who signed the agreement. Frank R. Guyon, the attorney who represented the employer-parties to the contract at the time it was negotiated, and in whose office the contract was mimeographed, testified at the hearing that he had been secretary of Credit Stores Association, which was organized in 1937; that the two Respondents herein, together with other retail credit stores had been members of that association; and that the organization, whose primary purpose (as revealed in its bylaws) was to represent its members in relations with labor unions, had ceased to have a formal existence after 1941, but had "been going along for some years, drifting along making use of the name, and so forth. * * *" He further testified that he had participated in the negotiations leading to the execution of the contract of December 17, 1948, as a representative of the employers, and had drafted the contract and secured the signatures of his clients thereto.

The Respondents contend that the Credit Stores Association was not actually in existence in a formal sense when the contract was entered into, and that, therefore, Guyon was acting on behalf of each of the employers individually at the time of the nego-

tiation and execution of the contract. I am of the opinion that it is unnecessary here to resolve the issue whether or not Credit Stores Association, as a formal entity, was in existence in 1947. The crucial circumstances relied on by the General Counsel are the facts that the contract was negotiated jointly between a group of employers (acting through their joint attorney, if not an association) and a union, in respect to a unit of employees consisting of all the employees of the employers involved. Identical terms and conditions of employment were agreed upon for all the employees comprising that unit.

The point made by the General Counsel is that even if the Board might have some doubt as to whether the Respondent Lee's, viewed in isolation, is the type of business enterprise over which it would wish to assert jurisdiction, the fact that its labor relations were carried on with respect to an appropriate bargaining unit consisting of the employees of a number of retail enterprises, including at least one (the Respondent Federal) which is clearly of a type and size over which the Board customarily exercises jurisdiction, should persuade the Board not to decline jurisdiction in this case over the Respondent Lee's. I agree with the position of the General Counsel.¹⁹

¹⁹Cf. International Typographical Union and the Baltimore Typographical Union No. 12, 87 N.L.R.B. No. 124, in which the Board said: "Nor do we consider it material, as the Respondents here suggest, that the record may not establish that the operation

II. The Organizations Involved

Retail Clerks International Association, A. F. of L., and the Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., are labor organizations admitting to membership employees of the Respondent Federal and the Respondent Lee's.

III. The Unfair Labor Practices

A. The execution and enforcement of the contract containing a union-security clause.

It is undisputed that on December 17, 1948, the Respondent Federal and the Respondent Lee's signed a collective bargaining contract with the Amalgamated which by its terms was to remain in effect until January 31, 1951. This contract concededly includes a clause reading as follows:

Article V. Membership in Union

2. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees at present employed in the classifications specified in Article II shall become members of the signatory Union within fifteen (15) days after the effective date of this agree-

of each and every individual employer whose employees form part of the bargaining unit here substantially affects interstate commerce within the meaning of the Act. It is sufficient for our purposes that the record discloses that the employee group comprising the unit, comprehensively viewed, is composed predominantly of employees whose employers' activities affect interstate commerce."

ment or shall be discharged by the Employer.

3. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees in the classifications specified in Article II and who are hired after the effective date of this agreement shall become members of the signatory Union within 30 days after the date of their employment or shall be discharged by the Employer.

The Respondents concede that the foregoing clause in the agreement has been enforced at all times since the contract was executed. It is also admitted by both Respondents that no election, as provided for in Section 9 (e), and required by the proviso to Section 8 (a) (3) of the Act, has been held among the Respondents' employees. Since the aforesaid union-shop clause in the contract was never authorized by the employees through such an election, the signing of the contract by the Respondent Federal,²⁰ and its subsequent enforcement by both the Respondent Federal and the Respondent Lee's clearly constituted unfair labor practices

²⁰As has been detailed in a preceding section of this Intermediate Report, the 6-month limitation embodied in Section 10(b) of the Act bars a finding of unfair labor practices based upon the signing of the illegal contract by the Respondent Lee's. Since the charge initiating this proceeding against the Respondent Federal was filed with the Board and served upon that Respondent within 6 months after the execution of the contract, no such bar exists with respect to findings based upon the signing of the contract by the Respondent Federal.

within the meaning of Section 8 (a) (1), (2), and (3) of the Act.²¹ I therefore find that by executing the aforesaid contract with the Amalgamated on December 17, 1948, and thereafter by keeping it in existence and enforcing it, the Respondent Federal lent illegal support and assistance to the Amalgamated in recruiting and maintaining its membership, in violation of Section 8 (a) (2) of the Act; discriminated in regard to the terms and conditions of employment of its employees, thereby encouraging membership in the Amalgamated, in violation of Section 8 (a) (3) of the Act; and by the foregoing conduct interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1) thereof. I further find that the Respondent Lee's, by keeping in existence and enforcing the aforesaid contract with the Amalgamated, at all times since December 22, 1948, lent illegal support and assistance to the Amalgamated in recruiting and maintaining its membership, in violation of Section 8 (a) (2) of the Act; discriminated in regard to the terms and conditions of employment of its employees, thereby encouraging membership in the Amalgamated, in violation of Section 8 (a) (3) of the Act; and by the foregoing conduct, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed

²¹Julius Resnick, Inc., 86 N.L.R.B. 38; Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., 81 N.L.R.B. 1052, 1054-1055.

by Section 7 of the Act, in violation of Section 8 (a) (1) thereof.

In his brief, counsel for the Respondent Lee's advances the argument that the complaint should be dismissed insofar as it alleges unfair labor practices based upon the unauthorized union-shop clause in the contract, because the charge which set this proceeding in motion as against the Respondent Lee's alleges "in only the most general terms a violation of Section 8 (a) (1) and 8 (a) (2), [and] makes no reference to any agreement or union-shop conditions or the lack of any UA election."²² For the reasons set forth in the Board's detailed discussion of the functions of a charge in *Cathey Lumber Company*, 86 N.L.R.B. No. 30, I find no merit in the foregoing contention.

An additional contention raised by counsel for the Respondent Lee's in his brief is, in sum, as follows: Preceding the execution of the contract here in issue, on December 17, 1948, there was in existence another collective bargaining contract between the same parties, dated January 31, 1947, which by its terms was to remain in effect until January 31, 1949. That agreement contained a

²²The charge in question alleges that the Respondent Lee's, among other things, "has interfered with, restrained and coerced its employees * * * in the exercise of their rights to self-organization and to determine bargaining representative of their own choosing in violation of Section 8(a)(1)," and that it "has dominated, assisted and supported [the Amalgamated] in violation of Section 8(a)(2) of the Act."

union-shop clause identical to the one included in the succeeding contract. Since the former agreement was entered into prior to the enactment of the Taft-Hartley Act, argues counsel, "the union-shop conditions therein were perfectly valid and legally effective after the passage of the Act (Section 102.)" In addition, he further contends, "the agreement of December 17, 1948, was merely an amendment of the 1947 agreement upon the wage-reopening. It only changed the wage rates in the 1947 contract. The union security provisions and other terms of the 1947 contract were not changed. * * * Hence the union shop provisions in the December 17, 1948, contract are not illegal." Section 102 of the Act, cited by counsel, answers his argument. That section provides that the performance of any obligation under a collective bargaining agreement entered into prior to June 23, 1947, the date of enactment of the amended Act, should not constitute an unfair labor practice thereunder, if the performance of such obligation would not have constituted an unfair labor practice under Section 8 (3) of the Act as it existed before its amendment, unless such agreement was renewed or extended subsequent thereto. The contract signed on December 17, 1948, replaced the preceding contract which by its terms expired on January 31, 1949. Thus it was clearly an extension or renewal of the prior contract, if not an entirely new one. Since, therefore, the contract entered into prior to the enactment of the Act as amended was extended or renewed subsequent to the enactment of the amend-

ments, the union-shop clause therein contained falls outside the savings clause of Section 102, and the argument advanced by counsel is clearly invalid.²³

B. The discharge of employees pursuant to the contract by the Respondent Federal.

1. Mandil Silverman.²⁴

Silverman was employed by the Respondent Federal as a salesman in one of its Los Angeles stores from about September, 1946, to about May, 1947, and again from about February 1, 1949, to on or about March 29, 1949, the date of his discharge.

During the afternoon of the last day of his employment, Silverman, while at work in the store, was handed an application card for membership in the Amalgamated by District Supervisor Cohen, who was in charge of the Respondent Federal's stores in that area, and was asked to sign it. Silverman refused to do so. Cohen thereupon left Silverman and conferred for a while with Store Manager Sells. The latter then informed Silverman that he (Sells) had been instructed to discharge him for refusing to join the Amalgamated, and told Silverman to get his belongings and leave the store immediately.

The foregoing findings are based on the credited testimony of Silverman, which was corroborated by

²³Cf. *Salant & Salant, Inc., supra.*

²⁴At the hearing Silverman gave his first name as "Mandil"; it is spelled in the pleadings as "Mandel."

that of the witness Diamond. Cohen admitted that he had instructed Sells to discharge Silverman, and that prior thereto he had asked Silverman to sign an Amalgamated card, which Silverman refused to do. He testified, however, that the incident involving the Amalgamated card occurred about a week prior to the date of Silverman's discharge, and that his decision to discharge Silverman on March 29 was prompted by the fact that he (Cohen) had been told that on that date Silverman had brought several organizers of the Retail Clerks into the store, who engaged in disorderly activities therein. Cohen also testified that it was his understanding that Silverman was, at the time of these events, a member of the Amalgamated, and that when Silverman refused to sign an Amalgamated card as requested, he (Cohen) remarked, "Well, you don't have to. I understand that you are already a member of the union." When asked whether or not he had ordered the discharge of Silverman for refusing to sign the Amalgamated card, Cohen answered, "I wouldn't say that. Maybe eventually I might have on that ground. I discharged Mr. Silverman for reasons of bringing strangers into our store and into our office, and disrupting our business." In view of the corroborated credible testimony of Silverman as to the sequence of events leading to his discharge, and the rather confused account given by Cohen, I regard the former's testimony as giving a more reliable version of those occurrences. As to the motive for Silverman's discharge, I also find Cohen's testimony unconvincing. Cohen admitted

that shortly before the date of Silverman's discharge, he had been informed that some of the employees in the store "were not members of the [Amalgamated], and that it would be necessary to see that they did join the union." And, admittedly, Cohen did thereafter ask Silverman to sign an Amalgamated application card, which Silverman refused to do.²⁵ Moreover, on the day following Silverman's discharge, another employee, as is found below, was discharged for his refusal to join the Amalgamated. The preponderance of the evidence convinces me, and I find, that Silverman was discharged by the Respondent Federal on or about March 29, 1949, because of his refusal to accede to the request of Cohen that he (Silverman) join the Amalgamated.

2. Nathan O. Schwartz.

Schwartz was employed as a salesman and window trimmer by the Respondent Federal in the same Los Angeles store in which Silverman was employed. He was hired in February of 1949, and was discharged on March 30, 1949.²⁶

On the morning of March 30, several of the em-

²⁵If, as Cohen asserted, it was his understanding that Silverman was already a member of the Amalgamated, it is difficult to understand why he found it necessary to ask him to join that union.

²⁶Although the complaint alleges the date of Schwartz' discharge as on or about March 29, 1949, it was stipulated at the hearing that it took place on March 30.

ployees of the store in a group including Schwartz were told by Store Manager Sells that all of the employees in the store who did not belong to the Amalgamated would have to join that Union in order to retain their jobs. After the group disbanded, Schwartz asked Sells whether it was true that he would be required to join the Union, and was told that it "was definite and you will have to join." The following conversation ensued:

Schwartz: Supposing I refuse to join?

Sells: In that case you will be fired.

Schwartz: Do I take it that I am fired?

Sells: You are fired right as of this moment, and what's more, I don't like your attitude.²⁷

On the basis of the undisputed evidence above summarized, I conclude and find that Schwartz was discharged by the Respondent Federal on or about March 30, 1949, because he refused to accede to the Respondent Federal's demand that he join the Amalgamated.²⁸

²⁷The above findings are based on Schwartz' undenied credited testimony.

²⁸The record contains no support for the allegations in the Respondent Federal's answer that Schwartz was discharged because he had, shortly prior thereto, asked to be transferred to another location because of the limited earning opportunity afforded by his job, and that thereafter Schwartz "showed his dissatisfaction by acts of gross insubordination which led to his discharge." Schwartz' refusal to join the Amalgamated can hardly be deemed to have constituted insubordination, since the Act protects such a refusal under the circumstances herein found.

3. Marie Margaret Faruzzi.

Faruzzi was employed by the Respondent Federal in its above-mentioned store as a cashier, from about June, 1948, to about April 27, 1949, on which date she was either discharged, or voluntarily quit her employment in a dispute over a requested wage increase which was refused her. That termination of her employment is not here in issue.²⁹

On an unspecified day in March, 1949, preceding the final termination of her employment by the Respondent Federal, there was some discussion among employees in the store with respect to the requirement that they join and pay dues to the Amalgamated.³⁰ During that day, Faruzzi was asked several times by Store Manager Sells to "pay the union dues," and Faruzzi consistently refused to do so. At the end of the day, Sells asked her "for the last time whether [she] was going to pay," and she again refused. Thereupon she was informed that she was discharged, and she left the

²⁹As has been set forth in a preliminary section of this Intermediate Report, paragraph 10 of the complaint, which alleges that Faruzzi was illegally discharged "on or about April 27, 1949," was amended at the hearing so as to allege that she was so discharged "some time in March, 1949."

³⁰Faruzzi's testimony with respect to the above was vague, but in the context of the record as a whole, it seems clear that the discussion which she described as "a lot of difference about this union business," refers to the attempts of the Respondent Federal during this period to get the employees of the store to join the Amalgamated.

store. After the store had closed, Faruzzi telephoned to Sells, informed him that since she "needed the job bad enough," she would agree to "pay the dues." Sells told her she could report to work the next morning. She did so, and continued in the employ of the Respondent Federal until her final termination in April. From the time of her reinstatement until she left her job, Amalgamated dues were deducted from her pay.³¹

The evidence above summarized reveals, and I find, that Faruzzi was actually discharged at the end of the day on which the aforesaid events occurred, because of her refusal to pay Amalgamated dues; that she was reinstated only upon her agreement to pay such dues, and that thereafter, to the end of her employment, the union dues were deducted from her pay by the Respondent Federal.

The legal issues raised by the aforesaid facts are whether her discharge, short of duration though it was, constituted an unfair labor practice, and whether the subsequent check-off of Amalgamated dues from her wages was in violation of the Act. These issues are disposed of in the concluding findings which follow.

C. Concluding findings with respect to the discharges of Silverman, Schwartz, and Faruzzi.

Since the union-security clause in the Respondents' contract with the Amalgamated has been

³¹The above findings of fact are based on Faruzzi's undenied, credited testimony.

found to be illegal, the discharges of Silverman and Schwartz pursuant to that clause in the contract plainly constituted such discrimination with regard to their tenure of employment, to encourage membership in a labor organization (the Amalgamated), as is prohibited by Section 8 (a) (3) of the Act. The aforesaid discharges necessarily interfered with, restrained, and coerced the employees of the Respondent Federal in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) thereof, and by illegally encouraging membership in the Amalgamated, constituted support and assistance to that Union by the Respondent Federal, in violation of Section 8 (a) (2) of the Act. I so find.

Faruzzi's discharge stands on a slightly different footing. That discharge was effected because she initially refused to yield to her Employer's demand that she pay dues to the Amalgamated. Since there was no valid contract in existence, requiring membership in good standing in the Amalgamated as a condition of employment by the Respondent, the employees had a legal right, if they wished, to refuse to pay dues to that organization. Since Faruzzi was discharged for exercising that right, the Respondent Federal thereby clearly interfered with, restrained, and coerced its employees in the exercise of their right, as guaranteed in Section 7 of the Act, to refrain from assisting a labor organization, in violation of Section 8 (a) (1) of the Act. Conversely, the Respondent's aforesaid conduct constituted illegal support and assistance to the

Amalgamated, in violation of Section 8 (a) (2) of the Act. I so find.³²

In his brief, counsel for the Respondent Federal points to the fact that paragraph 10 of the complaint alleges that Silverman, Schwartz and Faruzzi were discharged "for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection and because they refused to permit the employer to deduct union dues from their compensation." Counsel argues in effect that the aforesaid paragraph of the complaint should be dismissed because the proof fails to support the allegation that these employees were discharged for engaging in concerted activities. It is true that there is a variance between the complaint and the proof insofar as the former alleges that the three employees in question were discharged because they had engaged in concerted activities. However, I do not believe that this variance is fatal, since the issues with respect to the discharges were made clear at the hearing during the course of presentation of the General Counsel's case, the Respondent

³²Paragraphs 15 and 19 of the complaint allege that the discharges of Silverman, Schwartz, and Faruzzi constitute unfair labor practices within the meaning of Section 8(a) (1), (2), and (3) of the Act. Since the record does not show whether or not Faruzzi was, during the period above discussed, a member of the Amalgamated, her discharge cannot be held to have been effected to encourage membership in that Union. I therefore make no finding that her discharge constituted a violation of Section 8(a)(3) of the Act.

did not plead surprise, or request additional time in which to prepare a defense, and the aforesaid issues were fully litigated.

D. Concluding findings with respect to the collection of Amalgamated dues from Faruzzi following her reinstatement.

As we have seen, Faruzzi's payment of dues to the Amalgamated, following her discharge and reinstatement, was far from voluntary. Her submission to the deduction of such dues from her pay was, rather, dictated by the alternatives posed for her by the Respondent Federal, of either yielding to the check-off or being deprived of her job.

I am persuaded that such enforced deduction of union dues from the wages of an employee, when there is no legal obligation on the employee to maintain paid-up membership in the union as a condition of employment, necessarily infringes on the right of the employee, as guaranteed by Section 7 of the Act, to refrain from assisting a labor organization, and therefore constitutes unfair labor practices as defined in Section 8 (a) (1) and (2) of the Act. I see no conflict between this conclusion and the Board's holding in *Salant & Salant, Inc.*, 88 N.L.R.B. No. 156, which is relied on by the Respondents. In that decision the Board stated that the enactment of Section 302 of the Act, which placed certain limitations on the check-off of union dues, did not "have any impact on the unfair labor practice jurisdiction of this Board under Section 8, so as either to create or not create a per se violation

of Section 8 solely on the basis of a violation of those limitations.” The Board concluded that the enactment of Section 302 left undisturbed the application by it of its pre-existing criteria for determining whether the check-off of union dues, under a given set of circumstances, constitutes a violation of the broad proscriptions of Section 8 of the Act. It becomes necessary, then, to determine under what circumstances the Board has customarily held the check-off of union dues to constitute an unfair labor practice. The question usually arises, as it does herein, in connection with allegations that an employer has illegally assisted, contributed support to, or dominated a labor organization. The principle generally applied by the Board in such situations to find that the check-off was an unfair labor practice if, under all the circumstances, the employees from whose wages the union dues were deducted may be said to have been coerced by the employer into joining and paying dues to the union in question. Put another way, the rule seems to be that, “the Board normally orders the reimbursement of checked-off dues only in those cases where the actions of the employer are tantamount to coercing all employees to join the dominated organization.”³³

³³C. Ray Randall Mfg. Co., 85 N.L.R.B. No. 18 (in which the Board adopted the findings, conclusions, and recommendations of the Trial Examiner without, however, specifically passing on his above quoted formulation of the rule). For cases in which the Board has applied such a rule, see: Remington Arms Co., Inc., 62 N.L.R.B. 611, at 614, in which the Board did not order the employees reimbursed

As is indicated by the cases cited, the Board has held that there is nothing inherently violative of the Act in an employer deducting union dues from the pay of employees, even on behalf of a dominated union. The determining factor in deciding whether such conduct constitutes an unfair labor practice is whether the employer coerced the employees into permitting the deduction of dues. In other words, even where the employees are under no legal obligation to pay dues to the union in order

for checked-off dues because, as it pointed out, the circumstances were such that the employees were not coerced into joining and paying dues to the dominated union; Louisville Railway Co., 69 N.L.R.B. 691, at 702, in which the Board similarly refused to order reimbursement for checked-off dues because "membership [in the dominated organization] was not * * * compelled, and dues were checked off only on individual voluntary authorization." (Underlineation supplied.) H. J. Daniels Poultry Co., 65 N.L.R.B. 689, at 690, in which similar result was reached because the employer was not found to have "obligated all employees to join and support" the dominated organization; Pacific Plastic & Mfg. Co., Inc., 68 N.L.R.B. 52, 58, 96, in which reimbursement for checked-off dues was ordered, the employer having "insisted that its employees remain in good standing with [the dominated union] by payment of dues"; Supersweet Feed Co., Inc., 62 N.L.R.B. 53, 60, 84, in which a similar result was reached because the employers "insisted that their employees remain in good standing with [the dominated organization] by payment of dues, and a number of employees were threatened with discharge, pursuant to the closed-shop provisions of the said contracts, for their failure to do so"; Cannon Mfg. Corp., 71 N.L.R.B. 1059, 1092, reimbursement ordered where the dues were checked-off pursuant to an illegal union-security contract with a dominated union.

to retain their jobs, the employer may still deduct such union dues from their pay if the employees voluntarily permit him to do so, but if the employer, under such circumstances, coerces them into yielding to the check-off, the check-off then amounts to an invasion of the employees' rights under the Act. With this principle in mind, it becomes readily apparent that it makes no difference in the result whether the union on whose behalf the dues are checked-off has been held to be an employer-dominated organization or merely an illegally assisted one.³⁴ This the Board has recognized in a decision issued subsequent to that in the *Salant* case. (*Precast Slab and Tile Co.*, 88 N.L.R.B. No. 231, in which the Board ordered checked-off union initiation fees repaid to employees who were required by their employer to allow such deductions from their pay, although the A. F. of L. union involved was not found to have been employer-dominated.)

On the basis of the foregoing, I conclude and find that the Respondent Federal, by coercing Faruzzi into permitting it to deduct Amalgamated dues from her pay on and after the date of her reinstatement, and by deducting such dues from her pay under those circumstances, interfered with, restrained, and coerced her, as well as the rest of its employees, in the exercise of their right, which is guaranteed by Section 7 of the Act, to refrain from assisting a labor organization, thereby com-

³⁴As to the distinction between an illegally assisted union and a company-dominated one, compare *Carpenter Steel Company*, 76 N.L.R.B. 670, and *Hershey Metal Products Company*, 76 N.L.R.B. 695.

mitting unfair labor practices in violation of Section 8 (a) (1) of the Act, and in addition, thereby assisting and supporting the Amalgamated in violation of Section 8 (a) (2) of the Act.

E. The admitted check-off of Amalgamated dues by the Respondent Federal and the Respondent Lee's, from the pay of their employees generally.

As previously noted, both the Respondent Federal and the Respondent Lee's admit that at all times herein material they have checked off Amalgamated dues from the pay of some, though not all, of their respective employees, the employees in question (other than Faruzzi) not being specifically identified in the record. They also admit that such check-offs were effected without the written authorization of the employees involved. The question remains to be decided whether this general practice of making such dues deductions constituted an unfair labor practice. This issue necessitates further examination into the effect of the Board's decision in the Salant case. There the Board held that although the employer had violated Section 8 (a) (1) and (2) of the Act by entering into and keeping in effect an illegal union-shop contract with a union, it had not committed unfair labor practices by virtue of the provision in such contract for the check-off of union dues.³⁵ Aside from the circum-

³⁵In the case at bar the contract between the parties contains no provision for the check-off of union dues.

stances that the Respondent Federal has been found to have discharged two employees because of their refusal to join the Amalgamated, and one because of her refusal to pay dues to that organization, and has been found to have told other employees that membership in the Amalgamated was a condition of their employment, the facts in this case and in the Salant case are essentially identical.³⁶ It might seem, then, as the Respondents argue, that the holding in the Salant case requires the dismissal of the allegation that the Respondents herein violated the Act by checking off dues on behalf of the Amal-

³⁶Here, as in the Salant case, the illegal union-security contract replaced a preceding such contract which was legal because entered into prior to the enactment of the Taft-Hartley amendments to the Act, and these contracts were entered into with a union which, so far as appears, represented an uncoerced majority of the employers' employees. The record shows that the Respondents herein were parties to collective bargaining contracts with the Amalgamated at least from January 31, 1947, until December 17, 1948, on which date a new contract was entered into to remain in effect to January 31, 1950. Although it appears that the Respondents did not, at the time the latter contract was executed, demand or receive from the Amalgamated any proof of the latter's majority status as collective bargaining representative of the employees, and that the Amalgamated has never been certified by the Board as collective bargaining representative of the Respondents' employees, there is no affirmative showing in the record, nor indeed any allegation in the complaint or contention put forward by the General Counsel, that the contract in question was entered into by the Respondents with a union which did not represent an uncoerced majority of the Respondent's employees.

gamated. However, in the light of the cases heretofore cited, in which the Board applied the test of whether or not the dues deductions were voluntarily permitted by the employees, the Salant decision, it seems to me, must be read as resting on the assumption that, since the contracting union in that case represented an uncoerced majority of the employees, and since there was no proof that the employer had, aside from keeping in effect an illegal union-shop contract, coerced the employees into permitting the check-off of union dues, the employees had voluntarily acceded to the check-off. That assumption cannot be made here, at least with respect to the Respondent Federal, for that Employer, by discharging and threatening to discharge employees unless they joined and paid dues to the Amalgamated, created a situation by which its employees were necessarily forced to permit Amalgamated dues to be deducted from their pay, under fear of the loss of their jobs. I therefore conclude and find that the Respondent Federal has at all times since December 17, 1948, coerced some of its employees into permitting it to deduct Amalgamated dues from their pay, and has thereby, and by making such deductions, interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8 (a) (1) thereof, and has thereby given support and assistance to the Amalgamated, in violation of Section 8 (a) (2) of the Act.

Since no such specific acts of coercion were proved to have been committed by the Respondent

Lee's against its employees, the check-off of Amalgamated dues as practiced by it falls in the same category as that held not to constitute an unfair labor practice in the Salant case, and I shall therefore recommend that the complaint be dismissed insofar as it alleges that the Respondent Lee's violated the Act by deducting union dues from the pay of its employees.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent Federal and the Respondent Lee's set forth in Section III above, occurring in connection with the operations of these Respondents described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Since it has been found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

I have found that by entering into and thereafter enforcing an agreement with the Amalgamated containing certain illegal provisions, the Respondent Federal has committed unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3) of the Act, and that by enforcing the illegal provisions

of its contract with the Amalgamated, the Respondent Lee's has committed similar unfair labor practices. I shall therefore recommend that they cease and desist from those unfair labor practices or any like or related conduct.³⁷ As the Board has held, the effect of such coercive conduct would not be eradicated were the Respondents permitted to afford the Amalgamated the privilege of enjoying a representative status strengthened by virtue of the illegal union-shop contract. Therefore, in order to effectuate the purposes and policies of the Act, I shall recommend that the Respondents withdraw recognition from the Amalgamated and cease giving effect to the contract which was executed on December 17, 1948, with that organization, or to any modification, extension, supplement, or renewal thereof, unless and until the Amalgamated has been certified by the Board.³⁸ Nothing in this rec-

³⁷Since the Respondents engaged in the conduct herein found to be illegal pursuant to their contract with the Amalgamated, and on the mistaken assumption that they were not engaged in commerce within the meaning of the Act, I am not persuaded that their conduct bespeaks a general attitude of disregard for the rights of their employees, or that it indicates any likelihood of the commission of other unfair labor practices by these Respondents in the future. I do not, therefore, deem it necessary to recommend that they be ordered to cease and desist from in any manner infringing on the rights of their employees. *May Department Stores v. N.L.R.B.*, 326 U.S. 376.

³⁸In his brief counsel for the Respondent Lee's argues that since only the union-shop provision in the contract has been found illegal, the appropriate

ommendation, however, shall be deemed to require the Respondents to vary or abandon those wages, hours, seniority, or other substantive features of their relations with their employees established in performance of such contract, or to prejudice the assertion by the employees of any rights they may have under such agreement.

I have also found that the Respondent Federal committed unfair labor practices by deducting Amalgamated dues from the wages of some of its employees on and after December 17, 1948. The money which the Respondent Federal thus forced those employees to pay to the Amalgamated to fulfill the Respondent's illegal condition of employment was a definite financial loss on the part of the aforesaid employees. I will accordingly recommend that the employees of the Respondent Federal from whose pay Amalgamated dues were deducted on and after December 17, 1948, be made whole by reimbursement of the amounts thus illegally extracted from them.

I have found that the Respondent Federal illegally terminated the employment of employee Faruzzi during the month of March, 1949. Since her discharge was effected at the close of the day, and she was reinstated to her employment at the beginning of the next day, it is not necessary to

remedy is merely to require the parties to cease giving effect to that provision. However, the Board in *Julius Resnick, Inc.*, and in the *Salant* case, *supra*, found the remedy above recommended to be appropriate.

recommend the remedy of reinstatement or back pay in her case.³⁹ It has also been found that the Respondent Federal's discharge of Silverman and Schwartz constituted unfair labor practices under the Act. The record shows that about a week following his discharge Schwartz was offered an equivalent or more desirable position by the Respondent which he refused.⁴⁰ It will therefore not be recommended that the Respondent Federal again offer him reinstatement. It will, however, be recommended that the Respondent Federal make Schwartz whole for any loss of pay he may have suffered by reason of its discrimination against him, by payment of a sum of money equal to the amount he would have earned as wages from the date of his discharge to the date of the aforesaid Respondent's offer of reinstatement which he refused, less his net earnings during the said

³⁹It is understood, of course, that the recommendation that the Respondent Federal reimburse its employees for Amalgamated dues deducted from their pay, applies to Faruzzi.

⁴⁰Although at one point in his testimony Schwartz indicated that he was not definitely offered the aforesaid position, the record as a whole convinces me that a definite offer of the position was made to him. At a subsequent point in his testimony Schwartz testified that in a conversation with a representative of the Respondent he told that representative that he "couldn't take the job [the Respondent] had offered," because he planned to enter into a business of his own.

period.⁴¹ As to Silverman, the record reveals that on or about March 7, 1950, he entered into an agreement with counsel for the Respondent Federal in compromise of his claim against that Respondent arising out of his discharge. At the hearing Silverman testified that he was not asking for any back pay, nor for an offer of reinstatement in the employ of the Respondent Federal. Since the Act establishes a public policy and is enforced in order to effectuate that policy, and not to satisfy any private claims which might arise from violations of the Act, it follows that private agreements in settlement of such personal claims are not effective to bar the Board from ordering whatever remedy is appropriate to effectuate the public policies of the Act. Consequently, Silverman was asked at the hearing whether his testimony that he was not seeking re-employment by the Respondent Federal was based solely on the private agreement which he made with that Respondent, and he answered that he did not desire reinstatement in any event. In view of that statement, it will not be recommended that the Respondent Federal offer reinstatement to Silverman. It will be recommended, however, that Silverman be made whole for any loss of pay he may have suffered by reason of the Respondent Federal's discrimination against him, by payment to him of a sum of money equal to the amount he would have earned as wages from the date of his discharge to the date (March 7, 1950) when he testified that he

⁴¹See *Crossett Lumber Company*, 8 N.L.R.B. 440, 497-498.

did not desire reinstatement, less his net earnings during the said period.⁴²

It will also be recommended that the Respondents post appropriate notices to their employees in connection with the foregoing.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Retail Clerks International Association, A. F. of L., and Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., are labor organizations within the meaning of Section 2 (5) of the Act.

2. Federal Stores Division of Speigel, Inc., and Leo Katz, Minda Katz, Otto Katz, Leomond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, doing business as Lee's Department Store, are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. By entering into its contract with the Amalgamated on December 17, 1948, and thereafter enforcing its illegal provisions, the Respondent Federal committed unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3) of the Act.

⁴²Although I do not regard the private settlement between Silverman and the Respondent Federal as binding, I see no reason why any amount paid to him pursuant to that agreement should not be credited as against any sum found to be due him.

4. By enforcing the illegal provisions of its contract with the Amalgamated at all times since December 22, 1948, the Respondent Lee's committed unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3) of the Act.

5. By discriminating in regard to the hire and tenure of employment of Mandil Silverman and Nathan O. Schwartz to encourage membership in the Amalgamated, the Respondent Federal supported and assisted the Amalgamated, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3) of the Act.

6. By its discharge of Marie M. Faruzzi, the Respondent Federal interfered with, restrained, and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act, and assisted and supported the Amalgamated, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (2) of the Act.

7. By coercing its employees into permitting it to deduct dues from their pay on behalf of the Amalgamated, on and after December 17, 1948, the Respondent Federal interfered with, restrained, and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act, and supported and assisted the Amalgamated, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (2) of the Act.

8. By demanding that its employees become and remain members of the Amalgamated, and by threatening them with discharge for their failure to do so, the Respondent Federal assisted and supported the Amalgamated, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (2) of the Act.

9. All of the aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

10. The Respondent Lee's has not engaged in unfair labor practices by deducting Amalgamated dues from the pay of some of its employees.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, I recommend that the Respondent Federal Stores Division of Speigel, Inc., of San Francisco, California, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Entering into, renewing, or enforcing any agreement with Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless

such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(b) Recognizing Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., or any successor thereto, as the representative of any of its employees at its stores in the Los Angeles, California, area, for the purposes of dealing with the said Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(c) Performing or giving effect to its contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., or to any modification, extension, supplement, or renewal thereof or to any other contract, agreement or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(d) Discharging or threatening to discharge any of its employees, or in any other manner discriminating or threatening to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage membership in the Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., or any other labor organization of its employees, except to the extent that such conduct may be required by a valid agree-

ment requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act;

(e) Requiring its employees to pay dues to the Amalgamated, or to any other labor organization of its employees, except to the extent that paid-up membership in a labor organization may be required as a condition of employment by a valid agreement, as authorized in Section 8 (a) (3) of the Act;

(f) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, join or assist Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., as the representative of any of the employees of the Respondent Federal for the purposes of dealing with the said Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of

employment unless and until said organization shall have been certified by the National Labor Relations Board;

(b) Make whole Mandil Silverman for any loss of pay he may have suffered by reason of the Respondent Federal's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned in the said Respondent's employ from the date of his discharge to the date (March 7, 1950), when he testified that he did not desire reinstatement in the aforesaid Respondent's employ, less his net earnings during such period, and whatever amount the said Respondent may already have paid him on account thereof;

(c) Make whole Nathan O. Schwartz for any loss of pay he may have suffered by reason of the Respondent Federal's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned in the said Respondent's employ from the date of his discharge to the date when the Respondent Federal offered him reinstatement in its employ, less his net earnings during such period;

(d) Make whole each of its employees, including Marie Margaret Faruzzi, from whose pay deductions of Amalgamated dues were made at any time since December 17, 1948, by reimbursing each of said employees for the amounts thus deducted from their pay;

(e) Post at its stores in Los Angeles and Huntington Park, California, copies of the notice at-

tached hereto marked Appendix A. Copies of said notice shall be furnished to the Respondent Federal by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of the said Respondent, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(f) Notify the Regional Director for the Twenty-first Region in writing within twenty (20) days from the date of this Intermediate Report what steps it has taken to comply therewith.

It is also recommended that the Respondents Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, doing business as Lee's Department Store, Huntington Park, California, and their agents, successors, and assigns, shall;

1. Cease and desist from:

(a) Renewing or enforcing any agreement with Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., or any other labor organization which requires their employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement

has been authorized as provided by the National Labor Relations Act, as amended;

(b) Recognizing Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., or any successor thereto as the representative of any of their employees at their store in Huntington Park, California, for the purposes of dealing with the said Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(c) Performing or giving effect to their contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local No. 81, C.I.O., or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(d) In any like or related manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, join or assist Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to

refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, C.I.O., as the representative of any of their employees, for the purposes of dealing with the said Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(b) Post at their store in Huntington Park, California, copies of the notice attached hereto marked Appendix B. Copies of said notice shall be furnished to the said Respondents by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of the said Respondents, be posted by them immediately upon receipt thereof and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted, Reasonable steps shall be taken by the said Respondents to insure that said notices are not altered, defaced, or covered by any other material; and

(c) Notify the Regional Director for the

Twenty-first Region in writing within twenty (20) days from the date of this Intermediate Report what steps they have taken to comply therewith.

It is also recommended that the complaint be dismissed insofar as it alleges that the aforesaid Respondents herein referred to collectively as the Respondent Lee's committed unfair labor practices by checking off Amalgamated dues from the pay of their employees.

It is further recommended that unless each of the Respondents herein referred to as the Respondent Federal and the Respondent Lee's, shall within twenty (20) days from the receipt of this Intermediate Report notify the aforesaid Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an origi-

nal and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 12th day of May, 1950.

/s/ ISADORE GREENBERG,
Trial Examiner.

Appendix A

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not enter into, renew, or enforce any agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We Will withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as the representative of any of our employees at our Los Angeles and Huntington Park, California, stores, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until Amalgamated Clothing Workers of America, Local Union No. 81, CIO, shall have been certified by the National Labor Relations Board as the bargaining representative of our said employees.

We Will cease performing or giving effect to our contract of December 17, 1948, with

Amalgamated Clothing Workers of America, Local Union No. 81, CIO, covering employees at our Los Angeles and Huntington Park, California, stores, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such organization shall have been certified by the National Labor Relations Board.

We Will Not discharge or threaten to discharge any of our employees, or in any other manner discriminate or threaten to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage membership in the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, except to the extent that such conduct may be required by a valid agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will Not require our employees to pay dues to Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or to any other labor organization, except to the extent that paid-up membership in a labor organization may be required as a condition of employment by a valid agreement, as authorized in

Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks International Association, A. F. of L, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will reimburse each of our employees, including Marie Margaret Faruzzi, from whose pay deductions were made since December 17, 1948, for dues paid to Amalgamated Clothing Workers of America, Local Union No. 81, CIO.

We Will make Nathan O. Schwartz, and Mandil Silverman whole for any loss of pay suffered as a result of discrimination.

FEDERAL STORE DIVISION
OF SPEIGEL, INC.,
(Employer)

Dated:.....

By.....,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not renew or enforce any agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We Will withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as the representative of any of our employees at our Huntington Park, California, store, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until Amalgamated Clothing Workers of America, Local Union No. 81, CIO,

shall have been certified by the National Labor Relations Board as the bargaining representative of our said employees.

We Will cease performing or giving effect to our contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, covering employees at our Huntington Park, California, store, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such organization shall have been certified by the National Labor Relations Board.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as au-

thorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-MOND KATZ, PHIL KATES, DOROTHY KATES, ELY ELIAS, BERTHA ELIAS, JULIAN ELIAS, and WALTER L. KEEN,
Doing Business as LEE'S DEPARTMENT
STORE

(Employer)

Dated:.....

By.....,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

File in Formal File.

United States of America

Before the National Labor Relations Board

[Title of Causes.]

ORDER TRANSFERRING CASES TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled cases having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

It Is Hereby Ordered, pursuant to Section 203.45 of National Labor Relations Board Rules and Regulations, Series 5, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., this 12th day of May, 1950.

By direction of the Board:

/s/ FRANK M. KLEILER,
Executive Secretary.

Note: Communications concerning compliance with the Intermediate Report should be with the Director of the Regional Office issuing the complaint. Your attention is specifically directed to the concluding paragraph of the Intermediate Report in respect to your right to file exceptions, briefs, and to request oral argument. Please note that exceptions and brief must be filed as separate documents.

File in Formal File.

United States of America
Before the National Labor Relations Board,
Washington, D. C.

[Title of Causes.]

EXCEPTIONS OF RESPONDENT LEE'S
DEPARTMENT STORE TO THE PRO-
CEEDINGS AND THE INTERMEDIATE
REPORT

Lee's Department Store, a respondent in the above-entitled proceedings, pursuant to Section 203.46 of the Rules and Regulations of the National Labor Relations Board, submits herewith its Exceptions to the Intermediate Report and recommended order and to the record and proceedings. In these exceptions we will follow the headings and arrangement of the Intermediate Report, and refer to the paging therein. Accordingly, Respondent excepts to the following:

Statement of the Case

(1) Page 2, lines 52-57. The Trial Examiner erred at the hearing in denying this respondent's motions to sever the cases, to dismiss the complaint, and to strike various portions of the complaint (Tr. pp. 13-30, 139-144, 296-297).

(2) Page 3, lines 33-34. The Trial Examiner erred in his intermediate Report in denying this respondent's motion to strike paragraph 9 and all evidence in support thereof (Tr. pp. 22-26, 139-144, 295).

(3) Page 5, lines 37-40. The Trial Examiner erred in his Intermediate Report in denying this respondent's motion to strike paragraphs 7, 8, 9, 12 and 14 and the reference in paragraph 19 to Section 8 (a) (2) of the Act (Tr. pp. 26, 27-30, 296-297).

Findings of Fact

I. The Business of the Respondents

(4) Page 8, lines 10-14. This finding, on the record, is contrary to the decisions and policies of the Board.

(5) Page 8, lines 16-21. This finding is without any support in the evidence. The General Counsel made no claim that a multi-employer bargaining unit was in effect, and the contract (G. C. Exh. 4) establishes single employer bargaining units.

(6) Page 8, lines 21-40. These findings are incomplete in failing to include the uncontradicted testimony establishing that the Credit Stores Association had ceased to exist (formally and informally) in 1941 and did not function in any way thereafter (Tr. pp. 38-40, 42-46, 143, 144, 171-172, 177-178).

(7) Page 8, lines 41, 45. This finding is inaccurate and incomplete. This respondent contends that the Association was not in existence in any sense when the contract was entered into, and Guyon was in fact acting on behalf of each of the stores individually (Tr. pp. 60-61, 176, 180).

(8) Page 9, lines 6-7 and 15-16. There was no evidence of a multi-employer bargaining unit.

III. The Unfair Labor Practices

A. The Execution and Enforcement of the Contract Containing a Union-Security Clause

(9) Page 10, lines 15-18, 28-37. This finding and conclusion is contrary to law, is improper in view of the proviso to Section 10(b) of the Act, is contrary to the evidence inasmuch as the allegedly illegal provision was in effect prior to the Taft-Hartley Act (G. C. Exhs. 3 and 4), and is not supported by any charge.

(10) Page 11, line 3. This finding is contrary to law.

(11) Page 11, lines 9-10, 29-35. See Exception (9).

IV. The Effect of the Unfair Labor Practices Upon Commerce

(12) Page 18, lines 25-29. This finding is without support in the evidence and is contrary to law.

V. The Remedy

(13) Page 18, line 49; page 19, line 4. This recommendation is improper and contrary to law.

Conclusion of Law

(14) Page 20, lines 30-34. This conclusion is contrary to law and without support in the record.

(15) Page 20, lines 41-44. This conclusion is contrary to law and without support in the record.

Recommendations

(16) Page 23, line 18; page 24, line 20. These recommendations in their entirety are contrary to law and without support in the record. Furthermore, assuming a violation in the respects found, the only appropriate order would be paragraph 1(a) and the posting of a notice containing the substance of that paragraph.

Wherefore, Respondent Lee's urges the National Labor Relations Board to accept and adopt each of the Exceptions herein and act accordingly by dismissing this proceeding.

Dated: June 15, 1950.

Respectfully submitted.

LATHAM & WATKINS,

THEODORE J. ELIAS,

HAROLD EASTON,

By R. W. LUND,

Attorneys for Respondent
Lee's Department Store.

United States of America
Before the National Labor Relations Board

[Title of Causes.]

DECISION AND ORDER

On May 12, 1950, Trial Examiner Isadore Greenberg issued his Intermediate Report in the above-entitled proceeding, finding that Respondent Federal and Respondent Lee's had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that Respondent Lee's had not engaged in certain other unfair labor practices, and recommended dismissal as to them. Thereafter, both Respondents filed exceptions to the Intermediate Report and briefs in support thereof.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case,¹ and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except insofar as they are inconsistent with this Decision and Order.

¹After the issuance of the Intermediate Report, the Board received two stipulations entered into by all the parties and providing for certain corrections in the transcript of testimony. The stipulations are hereby approved and made a part of the record.

1. We agree with the Trial Examiner's finding that the Board has jurisdiction over both Respondents because of their participation in an association-wide bargaining group of employers, whose total volume of operations substantially affect commerce within the meaning of the Act.²

The record shows that both Respondents and four other department store employers doing business in southern California were members of Credit Stores Association, herein called the Association, whose representative negotiated a contract with the Amalgamated on December 17, 1948, the terms of which apply to all employees of the six employers. The annual total purchases of these employers are in excess of \$3,000,000, of which amount in excess of \$750,000 is received directly from points outside the State of California.³ In view of the foregoing, and our recent decision in the Federal Dairy case,⁴ we find that it will effectuate the policies of the Act to assert jurisdiction over Respondents Federal and Lee's.

2. The Trial Examiner found, and we agree, that

²Carpenter & Skaer, Inc., et al., 89 N.L.R.B. No. 167, and cases cited therein.

³These figures include the volume of purchases made by Respondent Federal for its three stores in southern California, all of which are covered by the above contract.

⁴Federal Dairy Co., Inc., 91 N.L.R.B. No. 107, wherein the Board adopted a minimum direct inflow requirement of \$500,000 as a determinative factor in asserting jurisdiction.

both Respondents violated Section 8 (a) (1), (2), and (3) of the Act for the reasons that (1) Federal executed and enforced the contract of December 17, 1948, by unlawfully requiring membership in the Amalgamated as a condition of employment, and (2) that Lee's unlawfully enforced the illegal union-seniority provision.

3. We agree with the Trial Examiner that Respondent Federal also violated Section 8 (a) (1), (2), and (3) of the Act by discharging employees Silverman and Schwartz because they refused to join the Amalgamated. We also agree with the Trial Examiner's finding that Respondent Federal violated Section 8 (a) (1) and (2) by discharging employee Faruzzi because she refused to permit Federal to deduct dues from her pay in favor of the Amalgamated. As no exceptions were filed, we do not pass upon the Trial Examiner's reasons for refusing to find that Faruzzi's discharge was also a violation of Section 8 (a) (3).⁵

4. The Trial Examiner found, and we agree, that Respondent Federal violated Section 8 (a) (1) and (2) of the Act by coercing some of its employees into permitting it to deduct Amalgamated dues from their pay. Respondent Federal contends that the Board's holding in the Salant case⁶ requires the dismissal of this portion of the complaint. In that case, the Board held that there was no violation of

⁵See Intermediate Report, footnote 32.

⁶Salant & Salant, Inc., 88 N.L.R.B. No. 156.

the Act where a check-off agreement inured to the benefit of a union that represented an uncoerced majority of the employer's employees. While it is true that the Amalgamated occupied a similar status, the instant proceeding may be otherwise distinguished from the Salant case. Here the employees did not furnish Federal with Voluntary written authorizations for the check-off. Furthermore, as evidenced by the discriminatory discharge of Faruzzi and the fact that the employees were told by Federal that they could not continue working unless they joined the Amalgamated and paid dues, it is clear that Respondent Federal coerced its employees to accept the check-off. We have heretofore held that an employer's coercion in deducting dues from its employees is violative of the Act, and as recommended by the Trial Examiner, such employees are entitled to reimbursement for all monies so deducted.⁷

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

⁷Precast Slab and Tile Co., 88 N.L.R.B. No. 231. As the Amalgamated is not a respondent in this proceeding, we are unable to accept Respondent Federal's contention that the Amalgamated should also be held responsible for the reimbursement of dues or any back pay to which some of the employees are entitled. Cf. H. M. Newman, et al., 85 N.L.R.B. 727.

1. Respondent Federal Stores Division of Spiegel, Inc., of San Francisco, California, and its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Entering into, renewing, or enforcing any agreement with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(2) Recognizing Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any successor thereto, as the representative of any of its employees at its stores in the Los Angeles, California, area, for the purposes of dealing with the said Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(3) Performing or giving effect to its contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or to any modification, extension, supplement, or renewal thereof or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other condi-

tions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(4) Discharging or threatening to discharge any of its employees, or in any other manner discriminating or threatening to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage membership in the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization of its employees, except to the extent that such conduct may be required by a valid agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act;

(5) Requiring its employees to pay dues to the Amalgamated, or to any other labor organization of its employees, except to the extent that paid-up membership in a labor organization may be required as a condition of employment by a valid agreement, as authorized in Section 8 (a) (3) of the Act;

(6) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, join or assist Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except

to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

B. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as the representative of any of the employees of the Respondent Federal for the purposes of dealing with the said Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(2) Make whole Mandil Silverman for any loss of pay he may have suffered by reason of the Respondent Federal's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned in the said Respondent's employ from the date of his discharge to the date (March 7, 1950), when he testified that he did not desire reinstatement in the aforesaid Respondent's employ, less his net earnings during such period, and whatever amount the said Respondent may already have paid him on account thereof;

(3) Make whole Nathan O. Schwartz for any loss of pay he may have suffered by reason of the

Respondent Federal's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned in the said Respondent's employ from the date of his discharge to the date when the Respondent Federal offered him reinstatement in its employ, less his net earnings during such period;

(4) Make whole each of its employees, including Marie Margaret Faruzzi, from whose pay deductions of Amalgamated dues were made at any time since December 17, 1948, by reimbursing each of said employees for the amounts thus deducted from their pays;

(5) Post at its stores in Los Angeles and Huntington Park, California, copies of the notice attached to the Intermediate Report marked Appendix A.⁸ Copies of said notice shall be furnished to the Respondent Federal by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of the said Respondent, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places,

⁸Said notice, however, shall be, and it hereby is, amended by striking from line 3 thereof the words "The recommendations of a Trial Examiner" and substituting in lieu thereof the words "Decision and Order." In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "Decision and Order" the words "Decree of the United States Court of Appeals Enforcing."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(6) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps it has taken to comply herewith.

2. Respondents Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, doing business as Lee's Department Store, Huntington Park, California, and their agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Renewing or enforcing any agreement with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires their employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(2) Recognizing Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any successor thereto as the representative of any of their employees at their store in Huntington Park, California, for the purposes of dealing with the said Respondents concerning grievances, labor disputes,

wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(3) Performing or giving effect to their contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(4) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, join or assist Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

B. Take the following affirmative action which

the Board finds will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as the representative of any of their employees, for the purposes of dealing with the said Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(2) Post at their store in Huntington Park, California, copies of the notice attached to the Intermediate Report marked Appendix B.⁹ Copies of said notice shall be furnished to the said Respondents by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of the said Respondents, be posted by them immediately upon receipt thereof and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondents to insure that said notices are not

⁹This notice, however, shall be and it hereby is, amended by striking from line 3 thereof the words "The recommendations of a Trial Examiner" and substituting in lieu thereof the words "Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted, before the words "Decision and Order," the words "Decree of the United States Court of Appeals Enforcing."

altered, defaced, or covered by any other material;

(3) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps they have taken to comply herewith.

It is further ordered that the complaint be dismissed insofar as it alleges that the aforesaid Respondents herein referred to collectively as the Respondent Lee's, committed unfair labor practices by checking off Amalgamated dues from the pay of their employees.

Signed at Washington, D. C., this 4th day of Oct., 1950.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

PAUL L. STYLES,
Member.

[Seal]: NATIONAL LABOR
RELATIONS BOARD.

File in Informal File.

United States Court of Appeals
for the Ninth Circuit

No. 12827

In the Matter of

LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-
MOND KATZ, PHIL KATES, DOROTHY
KATES, ELY ELIAS, BERTHA ELIAS,
JULIAN ELIAS and WALTER L. KEEN,
d/b/a LEE'S DEPARTMENT STORE,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF ORDER OF
NATIONAL LABOR RELATIONS BOARD

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store, a co-partnership, petition this Honorable Court for a review of a certain Order entered on October 4, 1950, by the National Labor Relations Board (hereinafter referred to as the "Board") in a proceeding instituted by it against these Petitioners and against Federal Stores Division of Speigel, Inc., which proceeding is designated upon the records of the Board as "In the Matter of Federal Stores Division of Speigel, Inc.,

and Retail Clerks International Association, A. F. of L., and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, Party to the Contract, Case No. 21-CA-420''; and ''In the Matter of Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store, and Retail Clerks International Association, A. F. of L., and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, Party to the Contract, Case No. 21-CA-481.''

In support of their petition your Petitioners respectfully allege and show:

(1) Petitioners are, and at all times herein mentioned were, a co-partnership doing business as Lee's Department Store. Petitioners maintain, and at all times herein mentioned have maintained, their principal place of business, and transact, and at all times herein mentioned have transacted, their principal business in the City of Huntington Park, County of Los Angeles, State of California, within this circuit.

(2) In the consolidated complaint issued by the Board in the above-mentioned proceeding, it was alleged that your Petitioners engage in certain unfair labor practices in the City of Huntington Park, County of Los Angeles, State of California, within this circuit.

(3) In the complaint issued by the Board it was alleged that Petitioners are engaged in commerce within the meaning of the Labor Management Rela-

tions Act, 1947. The Board found that purchases and shipments by these Petitioners of goods and merchandise across state lines and Petitioners' participation in an association-wide bargaining group of employers brought Petitioners under the jurisdiction of the Board.

(4) By reason of the facts set forth in paragraphs (1) and (3) above, this Court has jurisdiction to hear this petition pursuant to Section 10(f) of the Labor Management Relations Act, 1947.

(5) As will be more fully shown by the entire record of this proceeding to be certified by the Board and filed by Petitioners with this Court herein, the within proceedings before this Board included, without limitation, a consolidated complaint filed against your Petitioners (Case No. 21-CA-421) and Federal Stores Division of Spiegel, Inc., (Case No. 21-CA-420), Petitioners' Answer, Petitioners' motion to sever the case involving Petitioners (No. 21-CA-481) from the case involving Federal Stores Division of Spiegel, Inc., (No. 21-CA-420), Petitioners' motions to dismiss the complaint in its entirety, Petitioners' motion to strike certain paragraphs of the complaint, Petitioners' motion to strike certain testimony, Petitioners' motion to dismiss the complaint on jurisdictional grounds, Petitioners' motion to file amended answer, Petitioners' amended answer, the Board's order denying Petitioners' several motions, hearing for the purpose of taking testimony and receiving other evidence, intermediate report, order trans-

ferring case to the National Labor Relations Board, Petitioners' exceptions to the intermediate report and briefs supporting said exceptions. Upon the basis of the above, the Board on October 4, 1950, stated its findings of fact, conclusions of law and decision, and issued an order directed inter alia to Petitioners and their agents successors and assigns. A part of said order correctly directed that the complaint be dismissed "insofar as it alleges that the aforesaid Respondents herein referred to collectively, as the Respondents "Lee's" (your Petitioners herein), committed unfair labor practices by checking off Amalgamated dues from the pay of their employees." So much of the remainder of said order as relates to your Petitioners in this proceeding is as follows:

Order

2. Respondents Leo Katz, Minda Katz, Otto Katz, Leemon Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, doing business as Lee's Department Store, Huntington Park, California, and their agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Renewing or enforcing any agreement with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires their employees to join, or maintain their membership in, such labor organization as a condition of

employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(2) Recognizing Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any successor thereto as the representative of any of their employees at their store in Huntington Park, California, for the purposes of dealing with the said Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(3) Performing or giving effect to their contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(4) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, join or assist Retail Clerks International Association, A. F. of L.,

or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

B. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local No. 81, CIO, as the representative of any of their employees, for the purposes of dealing with the said Respondents governing grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board:

(2) Post at their store in Huntington Park, California, copies of the notice attached to the Intermediate Report marked Appendix B.⁹

⁹This notice, however, shall be and it hereby is, amended by striking from line 3 thereof the words "The recommendations of a Trial Examiner" and substituting in lieu thereof the words "Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there

Copies of said notice shall be furnished to the said Respondents by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of the said Respondents, be posted by them immediately upon receipt thereof and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(3) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps they have taken to comply therewith.

(6) Petitioners, and each of them, have been aggrieved by reason of the portion of said Order of the Board set out immediately above because, in respect thereof the Board's findings of fact are not supported by the evidence, its conclusions of law are erroneous and unlawful, and its rulings upon Petitioners' motions are erroneous and illegal.

Wherefore, Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store, petition this

shall be inserted, before the words "Decision and Order," the words "Decree of the United States Court of Appeals Enforcing."

Honorable Court for a review of the portion of the Order hereinabove set forth, which Order was entered by the Board on October 4, 1950, and respectfully pray:

1. That the Board be directed to certify and deliver to Petitioners a transcript of the entire record in the aforementioned proceedings before the Board;

2. That Petitioners may be granted leave to file such certified record within a reasonable time to be fixed by the Court;

3. That the aforementioned Order (except that portion thereof dismissing the complaint insofar as it alleges that Petitioners committed unfair labor practices by checking off Amalgamated dues from the pay of their employees) be set aside and that Petitioners, their agents, successors, and assigns, be relieved by order of the Court from the necessity of complying therewith; and,

4. For such other and further relief as may be proper.

Respectfully submitted,

/s/ RICHARD W. LUND,

Attorney for Petitioners.

State of California,
County of Los Angeles—ss.

Richard W. Lund, being first duly sworn, on oath, deposes and says: That I am the attorney for Petitioners in this proceeding attached hereto, I have

read the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for purposes of delay, and I believe Petitioners are justly entitled to the relief sought.

/s/ RICHARD W. LUND.

Subscribed and sworn to before me this 25th day of January, 1951.

[Seal] /s/ A. R. KIMBROUGH,
Notary Public in and for the State of California,
County of Los Angeles.

[Endorsed]: Filed January 27, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING OF PETITION FOR
REVIEW OF ORDER OF NATIONAL
LABOR RELATIONS BOARD

To the National Labor Relations Board, Washington, D. C.:

You are hereby notified that the petitioners in the above-entitled proceeding have filed, concurrently herewith, their petition to the United States Court of Appeals for the Ninth Circuit for review of the decision and order of the National Labor Relations Board in a proceeding before the National Labor Relations Board, designated upon the records

of said Board as "In the Matter of Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, d/b/a Lee's Department Store and Retail Clerks International Association, A. F. of L., and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, Party to the Contract, Case No. 21-CA-481."

A copy of said petition for review, together with a copy of this notice, is hereby served on you.

Dated January 24, 1951.

/s/ RICHARD W. LUND,
Attorney for Petitioners.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1951.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO THE PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act, as amended (61 Stat.

136, 29 U.S.C., Supp. III, Secs. 151, et seq.), herein called the Act, files this answer to the petition to review and set aside an order issued by the Board against Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, d/b/a Lee's Department Store, Petitioners herein, and the Board's request for enforcement of said order.

1. Answering the allegations in paragraphs (1), (2), (3), (4), and (5) of the Petition to Review, the Board prays reference to the certified transcript of the entire record of the proceedings before the Board filed herewith, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

2. Further answering, the Board denies each and every allegation of error contained in paragraph (6) of the Petition to Review, and avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act.

3. Further answering, the Board, pursuant to Section 10(e) of the Act, respectfully requests this Honorable Court for the enforcement of its order issued against Petitioners on October 4, 1950, in the proceedings designated on the records of the Board as Case No. 21-CA-481, entitled "In the Matter of Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias,

Julian Elias and Walter L. Keen, d/b/a Lee's Department Store."

In suport of this request for enforcement of its order, the Board respectfully shows:

(a) This Court has jurisdiction of the petition herein and of this request for enforcement by virtue of Section 10(e) and (f) of the Act.

(b) Upon all proceedings had in said matter, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herewith, to which reference is hereby made, the Board on October 4, 1950, duly stated its findings of fact and conclusions of law and issued an order directed to Petitioners, their agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Respondents Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias, and Walter L. Keen, doing business as Lee's Department Store, Huntington Park, California, and their agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Renewing or enforcing any agreement with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires their employees to join, or maintain their membership

in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(2) Recognizing Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any successor thereto as the representative of any of their employees at their store in Huntington Park, California, for the purposes of dealing with the said Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(3) Performing or giving effect to their contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(4) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, join or assist Retail

Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) 3 of the Act.

B. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as the representative of any of their employees, for the purposes of dealing with the said Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(2) Post at their store in Huntington Park, California, copies of the notice attached to the Intermediate Report marked Appendix B.⁹

⁹This notice, however, shall be and it hereby is, amended by striking from line 3 thereof the words "The recommendations of a Trial Examiner" and substituting in lieu thereof the words "Decision and

Copies of said notice shall be furnished to the said Respondents by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of the said Respondents, be posted by them immediately upon receipt thereof and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(3) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps they have taken to comply herewith.

(c) On October 4, 1950, the Board's Decision and Order were duly served on Petitioners.

(d) Pursuant to Section 10(e) and (f) of the Act, the Board has certified and filed with this Court a transcript of the entire record in the proceeding.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this answer and request for enforcement, and the filing of the certified transcript of the entire record in this

Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted, before the words "Decision and Order," the words "Decree of the United States Court of Appeals Enforcing."

proceeding to be served upon Petitioners, and that this Court take jurisdiction of the proceeding and of the questions to be determined therein, and make and enter upon the pleadings, evidence, and proceedings, set forth in the entire certified record of said proceedings, and upon so much of the order as set forth hereinabove, a decree denying the petition to review and set aside and enforcing in whole said order of the Board, and requiring Petitioners and their agents, successors, and assigns to comply therewith.

/s/ A. NORMAN SOMERS,

Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 9th day of March, 1951.

Appendix B

Notice to All Employees

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not renew or enforce any agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such

agreement has been authorized as provided by the National Labor Relations Act, as amended.

We Will withdraw and withhold all recognition from Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as the representative of any of our employees at our Huntington Park, California, store, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until Amalgamated Clothing Workers of America, Local Union No. 81, CIO, shall have been certified by the National Labor Relations Board as the bargaining representative of our said employees.

We Will cease performing or giving effect to our contract of December 17, 1948, with Amalgamated Clothing Workers of America, Local Union No. 81, CIO, covering employees at our Huntington Park, California, store, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such organization shall have been certified by the National Labor Relations Board.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through

representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-MOND KATZ, PHIL KATES, DOROTHY KATES, ELY ELIAS, BERTHA ELIAS, JULIAN ELIAS, and WALTER L. KEEN,
Doing Business as

LEE'S DEPARTMENT STORE,
(Employer)

By
(Representative) (Title)

Dated

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed March 13, 1951.

United States of America
Before the National Labor Relations Board,
Twenty-First Region

[Title of Causes.]

STIPULATION CORRECTING RECORD

It Is Hereby Stipulated between the parties to the above-entitled proceeding that the transcript in this matter shall be corrected in the following respects:

Page 206, commencing in line 3 in the sentence commencing with the words "I made," correct said sentence so that it shall read as follows:

"Mr. Ladar: I made it crystal clear that Mr. Silverman would not take the settlement and then disappear, and wouldn't claim that he was discharged for this reason or that reason."

Dated: April 28, 1950.

LATHAM & WATKINS,
THEODORE J. ELIAS,
HAROLD EASTON,

By /s/ R. W. LUND,
Attorneys for
Respondent Lee's.

JESSE H. STEINHART,
By /s/ S. A. LADAR,
Attorneys for
Respondent Federal.

GENERAL COUNSEL OF THE NATIONAL
LABOR RELATIONS BOARD,

By/s/ GEORGE H. O'BRIEN.

WIRIN, RISSMAN & OKRAND,

By /s/ ROBERT R. RISSMAN,

Attorneys for Amalgamated Clothing Workers of
America, Local Union No. 81, CIO.

GILBERT, NISSEN & IRVIN,

By /s/ WILLIAM B. IRVIN,

Attorneys for Retail Clerks International Associa-
tion, AFL.

Received May 5, 1950.

United States of America
Before the National Labor Relations Board
Twenty-First Region

[Title of Causes.]

STIPULATION CORRECTING RECORD

It Is Hereby Stipulated between the parties to
the above-entitled proceeding that the transcript in
this matter shall be corrected in the following re-
spects:

Page 288, line 6, after "area" insert: "A.
Yes. Mr. Lund:"

Page 288, line 8, change "Yes" to "no."

As thus corrected, this testimony will read:

"Mr. Lund: I take it your sales by your
store are all made to residents in the Southern
California area? A. Yes.

“Mr. Lund: You don’t ship sales outside of California?”

“The Witness: No.”

Dated: April 28, 1950.

LATHAM & WATKINS,
THEODORE J. ELIAS,
HAROLD EASTON,

By /s/ R. W. LUND,
Attorneys for
Respondent Lee’s.

JESSE H. STEINHART,

By /s/ S. A. LADAR,
Attorneys for
Respondent Federal.

GENERAL COUNSEL OF THE NATIONAL
LABOR RELATIONS BOARD,

By /s/ GEORGE H. O’BRIEN.

WIRIN, RISSMAN & OKRAND,

By /s/ ROBERT R. RISSMAN,
Attorneys for Amalgamated Clothing Workers of
America, Local Union No. 81, CIO.

GILBERT, NISSEN & IRVIN,

By /s/ WILLIAM B. IRVIN,
Attorneys for Retail Clerks International Associa-
tion, AFL.

Received May 5, 1950.

Before the National Labor Relations Board
Twenty-First Region

[Title of Causes.]

Suite 607-613, Hearing Room No. 2,
111 West Seventh Street,
Los Angeles, California,
Tuesday, March 7, 1950.

Pursuant to notice, the above-entitled matter came
on for hearing at 10:00 o'clock a.m. [1*]

Before: Isadore Greenberg,
Trial Examiner.

Appearances:

GEORGE H. O'BRIEN,

111 West Seventh Street,
Los Angeles, California,

Appearing on Behalf of Robert N.
Denham, General Counsel.

SAMUEL A. LADAR,

Room 700, 111 Sutter Street,
San Francisco, California,

Appearing on Behalf of Respondent
Federal Stores, Division of Speigel,
Inc.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

LATHAM & WATKINS,
THEODORE J. ELIAS,
HAROLD EASTON, by
RICHARD W. LUND,

411 West Fifth Street,
Los Angeles, California,

Appearing on Behalf of Respondent
Lee's Department Store.

GILBERT, NISSEN & IRVIN, by
ROBERT W. GILBERT and
WILLIAM B. IRVIN,

Suite 317, 117 West Ninth Street,
Los Angeles, California,

Appearing on Behalf of Retail Clerks
International Association, A. F. of L.

WIRIN, RISSMAN & OKRAND, by
ROBERT R. RISSMAN,

257 South Spring Street,
Los Angeles, California,

Appearing on Behalf of Amalgamated
Clothing Workers of America, Local
Union No. 81, C.I.O. [2]

PROCEEDINGS

Trial Examiner Greenberg: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the Matter of Federal

Stores Division of Speigel, Inc., and Retail Clerks International Association, A. F. of L., Case No. 21-CA-420; In the Matter of Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, doing business as Lee's Department Store, and Retail Clerks International Association, A. F. of L., Case No. 21-CA-481, both of which cases have been consolidated for the purposes of convenience for the purpose of this hearing.

In both cases, also, there is mentioned in the caption to the case as a party to the contract, the Amalgamated Clothing Workers of America, Local Union No. 81, CIO.

The Trial Examiner conducting this hearing is Isadore Greenberg.

Will counsel and other representatives of the parties please state their appearances for the record.

For the General Counsel?

Mr. O'Brien: Appearing for Robert N. Denham, General Counsel, is George H. O'Brien. My address is care of the National Labor Relations Board, 111 West Seventh Street, Los Angeles, California.

Trial Examiner Greenberg: For the respondent Federal [4] Store's Division of Speigel, Inc.?

Mr. Ladar: Appearing for Federal Stores is Mr. S. A. Ladar. My address is 111 West Sutter Street, Room 700, San Francisco, California.

Trial Examiner Greenberg: For the Respondent Lee's Department Store?

Mr. Lund: Latham & Watkins, Theodore J. Elias, and Harold Easton, by Richard W. Lund,

411 West Fifth Street, Los Angeles 13, California.

Trial Examiner Greenberg: For the charging party, the Retail Clerks? ,

Mr. Gilbert: For the charging party, Gilbert, Nissen & Irvin, by Robert W. Gilbert and William B. Irvin, 117 West Ninth Street, Los Angeles.

Trial Examiner Greenberg: And for the Amalgamated Clothing Workers, the party to the contract?

Mr. Rissman: Wirin, Okrand & Rissman, by Robert R. Rissman, 257 South Spring Street, Los Angeles.

Trial Examiner Greenberg: Are there any further appearances?

Mr. Ladar: I think I should make a correction there. I should say that the firm name of which I am a member is Jesse H. Steinhart. I am Samuel Ladar of that firm.

Trial Examiner Greenberg: Are there any additional appearances?

(No response.) [5]

The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation.

Proposed corrections in the transcript should be submitted either by way of stipulation or motion to the Trial Examiner for his approval.

All matter that is spoke in the hearing room while

the hearing is in session is recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow automatic exceptions to all adverse rulings and upon appropriate request and order an exception will be permitted to stand to an entire line of questioning.

Any party shall be entitled upon request to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of such a request the Trial Examiner himself may ask for oral argument if, at the close of the hearing he believes such argument would be helpful to clarify the issues [6] and the contentions of the parties.

Any party shall also be entitled, upon request made before the close of the hearing, to file a brief or proposed findings of fact or conclusions of law or both with the Trial Examiner who, before the close of the hearing, will fix the time for such filing.

Mr. O'Brien?

Mr. O'Brien: If I may have the exhibits, Mr. Examiner.

I am asking the reporter to mark for identification the following documents:

As General Counsel's 1-A, the Charge filed on

March 30, 1949, against the Federal Stores by Retail Clerks International Association;

As General Counsel's Exhibit 1-B, an Affidavit of Service indicating that a copy of the Charge was served upon The Federal Stores, 720 South Broadway, on March 30, 1949;

As General Counsel's Exhibit 1-C, an Affidavit of Service showing that a copy of the aforementioned Charge was served upon Amalgamated Clothing Workers of America, CIO, Local 81, on April 11, 1949;

As General Counsel's Exhibit 1-D, the First Amended Charge in the same case, 21-CA-420, filed May 3, 1949;

As General Counsel's Exhibit 1-E, an Affidavit showing that the Federal Stores was served with a copy of the First Amended Charge on May 4, [7] 1949;

As General Counsel's Exhibit 1-F, an Affidavit showing that a copy of the Amended Charge was served on Amalgamated Clothing Workers Local 81, on May 6, 1949;

As General Counsel's Exhibit 1-G, a Charge filed June 17, 1949, by the same Retail Clerks Union against Lee's Department Store;

As General Counsel's Exhibit 1-H, an Affidavit of service showing that a copy of the Charge was served upon Lee's Department Store on June 20, 1949;

As General Counsel's Exhibit 1-I, an Affidavit of service showing that a copy of the Charge against Lee's Department Store was served on the Amalgamated Clothing Workers on July 18, 1949;

As General Counsel's Exhibit 1-J, the Consolidated Complaint, issued January 31, 1950, in Cases Nos. 21-CA-420 and 21-CA-481;

As General Counsel's Exhibit 1-K, the Order Consolidating Cases and Notice of Hearing setting the hearing in the instant matter for this date, time and place;

As General Counsel's Exhibit 1-L, an Affidavit of Service of Order Consolidating Cases and Notice of Hearing, Charges and Amended Charge;

As General Counsel's Exhibit 1-M, a letter from T. J. Elias—his name was entered today as counsel by Mr. Lund—dated February 9, 1950, requesting an extension of time with [8] which to answer;

As General Counsel's Exhibit 1-N, an order dated February 13, 1950, extending the time for filing of answer to February 24, 1950;

As General Counsel's Exhibit 1-O, an Affidavit of Service of the Order Extending Time to File Answer;

As General Counsel's Exhibit 1-P, the Answer of Lee's Department Store filed February 24, 1950.

Trial Examiner Greenberg: Off the record.

(Discussion off the record.)

Trial Examiner Greenberg: On the record.

Mr. O'Brien: As General Counsel's Exhibit 1-Q, an Answer of Respondent Federal Stores Division of Spiegel, Inc., filed March 1, 1950;

As General Counsel's Exhibit 1-R, an Amendment to Consolidated Complaint, dated February 28, 1950;

As General Counsel's Exhibit 1-S, an Affidavit of Service showing that the Order Consolidating Cases, Notice of Hearing, Consolidated Complaint, Amendment to Consolidated Complaint, Charges and Amended Charge were served upon the following parties on February 28, 1950: Brown's, 824 South Broadway; Star Outfitting Company, 919 South Broadway; Golden State Department Store, 210 South Broadway, Kay's Department Stores, 5127 South Broadway; and Credit Stores Association, 511 Lincoln Building, 742 South Hill Street, Los Angeles, California; [9]

As General Counsel's Exhibit 1-T for identification, an Affidavit of Service showing that the Amendment to the Consolidated Complaint was served on February 28, 1950, upon the parties named on the original service sheet.

(Thereupon the documents above referred to were marked General Counsel's Exhibits 1-A through 1-T for identification.)

Mr. O'Brien: I now offer General Counsel's Exhibit 1 in evidence.

Trial Examiner Greenberg: I assume all the parties, all counsel for the parties, have seen the documents in question.

Is there any objection to the admission of the formal papers?

Mr. Lund: No objection.

Mr. Rissman: No objection, although we did not receive a copy of 1-P, which is the Answer of Lee's Department Store.

Mr. Gilbert: I have no objection.

Trial Examiner Greenberg: I will ask counsel to furnish you a copy.

Mr. Rissman: I have seen the formal files. I have seen it.

Mr. Lund: It was mailed to the union.

Mr. Rissman: All right.

Trial Examiner Greenberg: There being no objection, General Counsel's Exhibits 1-A through 1-T, comprising the formal papers in this proceeding are admitted into evidence [10] as General Counsel's Exhibit 1.

(The documents heretofore marked General Counsel's Exhibits 1-A through 1-T for identification were received in evidence.)

Mr. Lund: May I see them just a moment?

Mr. Rissman: Before Mr. Lund makes his motions, I have a question of you, Mr. Greenberg.

As I read the Rules and Regulations, it would appear that Local 81, of the Amalgamated, my client, is a party to this proceeding, and a motion to intervene would not be necessary. I might correct it.

Trial Examiner Greenberg: I think it would be superfluous. Even in the absence of the granting of such a motion you would be granted just as much right to participate as you would if you were a party intervenor. You have a right to intervene as far as your interest in the matter appears.

Mr. Rissman: That's my understanding. Since we agree, I won't make the motion.

Trial Examiner Greenberg: Having had pre-

vious experience with parties to the contract, I think it might be well. It is impossible to define the area of your participation with any exactitude, but I think it can be generally defined as that area in which your interest appears; that is, insofar as the validity of the contract is concerned. I would sustain objection to your cross-examining witnesses as to matters which do not affect that particular part of the case, and which [11] duplicate either the examination which was actually made by respondents, the employers' counsel, or which they could have made.

Mr. Rissman: As I read the complaint, Consolidated Complaint, and as amended, all of the allegations relate very directly or indirectly to the contract situation.

Trial Examiner Greenberg: Well, that is where the difficulty in defining the area is concerned.

Mr. Rissman: I suppose we will have to leave the question open until we come to a specific point.

Trial Examiner Greenberg: When we have a specific issue on that, I will have to rule on it.

Mr. Rissman: I am sure you will.

Mr. O'Brien: Mr. Examiner, in connection with that, as Mr. Rissman pointed out his client is a representative—is a party to the contract and as such is a party to this proceeding. Not being made a respondent he is not required to file an answer.

Mr. Rissman: That is right.

Mr. O'Brien: But I think it might be very helpful if he would voluntarily file an answer so that

we can find out what his interest in this proceeding is.

Trial Examiner Greenberg: An answer to what? No complaint has been issued against the union represented by Mr. Rissman. I don't know how they can file an answer. I don't know whether [12] I would receive one.

Mr. Rissman: I have no intention of filing one.

Mr. O'Brien: I just wanted to raise that question, Mr. Examiner.

Mr. Rissman: As a matter of fact, I wouldn't know how to file an answer; I have never been a respondent.

Trial Examiner Greenberg: I think Mr. Lund indicated that he had some motions he wanted to present.

Mr. Lund: First, I should observe that my clients are 10 individuals as copartners doing business under the name of Lee's Department Store. You can all understand throughout this proceeding that we can speak of these respondents as Lee's or Lee's Department Store in the singular, and I will do so.

My first motion is that pursuant to Sections 102.24 and 102.33 of the Rules and Regulations of the Board, Series 5, Respondent Lee's Department Store hereby moves the Board, acting through its duly designated Trial Examiner, to sever and separate the case involving this respondent, No. 21-CA-481, from the case involving Respondent Federal Stores Division of Spiegel, Inc., No. 21-CA-420, upon the following grounds:

One, the order of consolidation issued by the Regional Director on January 31, 1950, was issued without authority and contrary to the Rules and Regulations of the Board and is, therefore, illegal and void.

Two, they would not effectuate the purposes of the Act [13] to consolidate these two cases and, three, numerous issues involving Respondent Federal Stores, Inc., are unrelated and unconnected in any way with the issues involving Respondent Lee's, and the effect of the consolidation would be to unduly complicate the record and increase the cost to respondent Lee's without any corresponding benefit or saving to the Board, the General Council, Respondent Federal Stores, or any other party.

By way of brief argument I want to observe, first, that as I read Section 102.33 of the Regulations, that is one place where the General Counsel has the authority reserved to himself, to in fact not designate his authority to the Regional Director. The Regional Director has no power to issue an order of consolidation. The Examiner will notice that the last part of that section contains a reference to that effect, exact language being:

“The provisions of Sections 102.9 to 102.32, inclusive, shall, insofar as applicable, govern proceedings before the General Counsel pursuant to this section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this section—” which is the consolidation section— “be reserved to and exercised by the General Counsel.”

I think I know what your difficulty is, Mr. Examiner. It's my understanding that the part, 203 of the—— [14]

Trial Examiner Greenberg: Before we get the record confused any further, sir, I thought there were some rules and regulations that I had never been aware of before. I think inadvertently you have been referring to 103 something.

Mr. Lund: 102. The Rules and Regulations of the Board, previously codified in the Regulations as part 203, have been codified, as I understand it, as part 102 of State Title 29 of the Code of Regulations that was published in Volume 14 of the Federal Register 78. So while the Board——

Trial Examiner Greenberg: What you are referring to——

Mr. Lund: Is the old section.

Trial Examiner Greenberg: 203.33?

Mr. Lund: Which I now understand is 102.33.

Trial Examiner Greenberg: I wasn't aware of any recent codification that you refer to. I have in my hands the Rules and Regulations of the Board, Series 5 as Amended, August 18, 1948, which was published in a little blue covered pamphlet and in which the rules referring to consolidation are numbers 203.33. That is to avoid confusion.

Mr. Rissman: On the first sheet of the blue pamphlet you have is a notice.

Mr. Lund: "Subtract 101 from numbers carried in this edition."

Trial Examiner Greenberg: I have been fur-

nished by Mr. O'Brien with the notice referred to. It isn't that I have [15] been away from law school so long; I have been away from grammar school so long that I find it difficult to subtract two point something. But at any rate, I think the record is now clear as to the reference being made by counsel.

Mr. Lund: On my second point in connection with my motion to sever, we believe it is unreasonable and unfair, unduly expensive and burdensome to my clients to begin this case with that involving Federal.

I think the Examiner has briefly studied the complaint, anyway, and you will find in there that while there are some provisions involving the validity of the union shop clause, those allegations principally involve questions of law. So far as our law is concerned, the principal allegations are admitted, so there is not much in the way of evidence going to be required on that issue.

Respondent Lee's is charged with illegal discharge of one man with which Federal is not interested, and Respondent Federal is charged with illegal discharge of three employees with which we are not interested. And, in addition, so far as Federal is concerned, the allegations in Paragraph 13 of five different violations of Section 8 (a) (1) of which we have no concern whatsoever.

If this matter remains consolidated Lee's is going to be required to sit here for hours, or perhaps days and weeks, having no interest whatsoever in all those charges [16] against Federal. We don't believe that that should be required of us. It is unnecessary, un-

reasonable and unduly burdensome and we urge on that independent ground, aside from the invalidity of the order consolidating, that the Trial Examiner at this time grant our motion to sever the proceedings.

Mr. O'Brien: Mr. Examiner, as far as the technical question raised by Mr. Lund that the General Counsel has power to consolidate these cases—of course the Regional Director does not act under the authority of the General Counsel—the Regional Director had authority from the General Counsel before this notice of consolidation was issued.

Mr. Lund: That doesn't appear in this record.

Mr. O'Brien: As to the second matter that he would be inconvenienced by staying here for two or possibly three weeks listening to matters which are of no concern to his client, I am sure that during at least the noon recess we can work out an order of proof here so that it won't be necessary for him to attend during such time as matters which do not concern his client are presented, or are being litigated. And I am asking the Trial Examiner to defer ruling upon Mr. Lund's motion until such time as he has heard the testimony of my first witness, who will be Mr. Guyon, who has been secretary of the Association or counsel for the Association of which both respondents are members, and who negotiated the [17] contract which is presently under attack. I don't think it would be possible for the Trial Examiner to rule intelligently upon that portion of Mr. Lund's motion until he had heard such testimony.

Mr. Lund: I think he should rule on the basis of the pleadings. As I see it, it is a valid objection to proceeding on this consolidated case. There has been no order of consolidation by the General Counsel.

Mr. Gilbert: Mr. Trial Examiner, I want to join in the statements made by the attorney for the General Counsel, and also to say that having myself unsuccessfully on other occasions urged the point now urged by Mr. Lund, and having been advised by various Trial Examiners that it was their understanding of the Rules and Regulations that the General Counsel may act through its agents just as the Board may act through its agents in a matter of this kind, I am satisfied that the first point of that motion was not well taken.

And as to whether or not the Trial Examiner desires to follow the suggestion made by attorney for the General Counsel, I am satisfied that on the face of the pleadings these two party respondents, parties to a contract who are members of the same association handling their affairs with regard to collective bargaining or for the purpose of collective bargaining, can have no valid objection to the order of consolidation.

Mr. Lund: I want to observe, Mr. Examiner, that it is [18] generally true that the Regional Director has the power and authority to act for the General Counsel, but this section says specifically that so far as consolidation is concerned the powers of consolidation are reserved for the General Counsel and not the Regional Director.

Trial Examiner Greenberg: Well, if you will look at the order of consolidation, sir, you will see that its opening recital says, "The General Counsel for the National Labor Relations Board having duly considered the matter and deeming it necessary," and so forth, "hereby orders, pursuant to Section 203.64 (b) of the National Labor Relations Board Rules and Regulations, Series 5, that these cases be, and they hereby are, consolidated."

Now, it is true that that order of consolidation is signed by the Regional Director for the Twenty-First Region, but the——

Mr. Lund: Not even that. You have got a rubber stamp. Nothing is signed by the Regional Director.

Trial Examiner Greenberg: This is a mimeographed copy of the order and I take it there is no question being raised as to its authenticity?

Mr. Lund: I wouldn't dispute that, no; but it is only signed by the Regional Director.

Trial Examiner Greenberg: "In witness whereof, the General Counsel . . . on behalf of the Board, has caused this Consolidated [19] Complaint . . . to be signed by the Regional Director," and so forth.

Mr. Lund: That's what the Regional Director says. We have nothing from the General Counsel.

Trial Examiner Greenberg: I can't see any question but that the act of ordering these cases consolidated was the act of the General Counsel acting through his agent in this Regional Director. So, frankly I can't see any merit——

Mr. Lund: Have you read the provisions of the Regulations? It plainly means to me that the Re-

gional Director has no power to act on consolidations.

Trial Examiner Greenberg: So I have no hesitation, therefore, in denying that part of your motion to sever, which is based on the technical ground that the order of consolidation heretofore issued is invalid.

Now, as to the question of that part of your motion which is predicated on the argument of injustice to your client in proceeding, I gather from the pleadings that one of the important issues in this case is the issue of jurisdiction based on disputed matters with regard to commerce. I would gather further from the pleadings and from remarks made by counsel so far in this hearing, that it is going to be the position of the General Counsel, at least, that in order to decide this question of jurisdiction both respondents have to be looked upon as having been associated together in an [20] association of employers in their collective bargaining, and having entered into a common contract through their joint bargaining representative; and that the matter of commerce has to be determined by looking at it from the point of view.

Without of course hinting at any position as to the merits of General Counsel's position, I think that if that is going to be the position of one of the parties here, it will be necessary, at least for part of this case, to have both parties here in one proceeding to determine that aspect of the matter.

I will, therefore, at this time, for the time being at least, deny the motion to sever in its entirety.

Mr. Lund: I would like now to make the additional motion, pursuant to Section 102.24 of the Rules and Regulations, Respondent Lee's Department Store hereby moves the Board, acting through its duly resigned Trial Examiner, to dismiss the complaint herein in its entirety on the ground that the General Counsel has failed to join an indispensable party as a party respondent, to wit, the Amalgamated Clothing Workers of America, Local Union No. 81, CIO.

By way of argument I want to point out that the complaint merely names that union as a party to the contract and does not make it a party respondent. No order is sought against the CIO. The gist of the whole complaint and proceedings is that my client and the CIO entered into and enforced a contract containing illegal union shop provisions. [21] If that is true and it is illegal, then on that ground the Board has jurisdiction and we are jointly liable. We submit that if there are any financial penalties or remedies involved it would be improper and illegal and unwarranted to require this respondent to bear the entire cost and not the union to bear its share. These provisions of the contract are for the union's benefit. As the complaint alleges domination of the union under 8 (a) (2), it is, therefore, for the existence and benefit of the union. To require this respondent to bear the full responsibility we feel is unauthorized, and until and unless the party jointly responsible with this party is made a party respondent the matter should be dismissed for failure to join an indispensable party.

Trial Examiner Greenberg: Now, as to that, I don't think I care to hear any argument. The motion is denied. I might state that I have no discretion as to the issuance of complaints. That is a matter which is by the statute given entirely into the hands of the General Counsel, and I could not presume, of course, to do anything which would invade that realm which was given to his discretion.

Mr. Lund: No, you couldn't.

Trial Examiner Greenberg: Furthermore, even for the General Counsel to move to issue a complaint—charges have to be filed. The motion is denied.

Mr. O'Brien: In that connection I refer Mr. Lund to [22] Section 10 (b) of the National Labor Relations Act.

Mr. Lund: I have read it. I know it by heart.

I now make the following motion, pursuant to Section 102.24 of the Rules and Regulations of the Board, Series 5: Respondent Lee's Department Store hereby moves the Board, acting through its duly designated Trial Examiner, to order Paragraph 9 of the Consolidated Complaint herein stricken upon the ground that the allegations of said paragraph are redundant and immaterial.

After you have had an opportunity to briefly examine that I would like to argue.

Mr. Rissman: What paragraph is that?

Trial Examiner Greenberg: That is the paragraph that relates to the deduction of union dues.

Mr. Lund: We believe that that entire paragraph is immaterial. It states by its actions that

respondent coerced and deprived the respective employees of their rights. It doesn't say what rights, whether it has deprived them of their rights under the Fair Labor Standards Act or Anti-Trust laws or National Labor Relations Act, or what.

Now, we do know that if this respondent is engaged in commerce, subject to the Taft-Hartley Act, it would be a violation of Section 302 of that Act for us to check off dues without written authority. But under subdivision (d) of Section 302 of the Act such conduct is made a misdemeanor and is not [22-A] anywhere made an unfair labor practice. On the contrary, Section 302 (e) specifically grants to the District Courts of the United States jurisdiction to enjoin violations of Section 302. Therefore, the National Labor Relations Board has no jurisdiction over any violations of Section 302.

Now, further, I think it is obvious that if our contract with the union shop provision is illegal, that aside from this requirement of 302 of the written authorization, there can be no violation of the National Labor Relations Act because we compulsorily check off the dues of the employees under a union shop clause. I need cite no authority for that.

So that if there is any illegality of the check-off here, aside from 302, it is only because our union shop clause is illegal, and we come right back to the point of Paragraph 8, the legality or illegality of that clause of the contract, if that clause of the contract is illegal.

I assume there are many ramifications as a result of illegality of that provision, not any one of which

results in an unfair labor practice. It is the union shop provision that is legal or illegal, and nothing else.

Therefore, we think that this whole Paragraph 9 is completely superfluous and immaterial to the proceeding. I think it is clear you can't come in here before this Trial Examiner and charge violations of Section 302 of the Taft-Hartley Act; that is a misdemeanor. [23]

Mr. O'Brien: This is the first time I have ever had respondents come in here and object to particularity in the complaint, Mr. Trial Examiner. The matters set forth in the paragraph to which Mr. Lund objects are the same matters which were considered by the—I don't know whether the case got to the Supreme Court or not, it was the Baltimore Transit—I feel reasonably certain it did—but the acts alleged in there were acts of assistance and domination in violation of Section 8 (a) (2) of the Act.

Mr. Gilbert: Mr. Trial Examiner, I should just like to call your attention to Paragraph 14 of the Consolidated Complaint, which points out, for the benefit of the respondent, the particular statutory provisions invoked with regard to Paragraph 9, reading as follows:

“The acts and conduct set forth in Paragraphs 8 and 9 hereof, Respondent Federal and Respondent Lee's have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3) of the Act.”

I think it is periodically clear that the General Counsel was not invoking the Fair Labor Standards Act or the Motor Vehicle Code of California or anything else.

Mr. Lund: I think you missed the point of my argument, Bob. My point is if the union shop provisions of this agreement are valid, then compulsory check-off is also valid. [24]

Trial Examiner Greenberg: Does that necessarily follow?

Mr. Lund: Yes. I haven't bothered bringing you cases. There are 75 per cent of the CIO unions could have compulsory check-off. I think the Board's cases are legion under the union shop provisions so far as the Wagner Act is concerned. It is true that it may be illegal under 302 of the Taft-Hartley Act if you don't require authority. That is not the concern of the National Labor Relations Board, that is a matter of concern of the U. S. attorneys.

So Section 9 boils down to: Is the union shop illegal? If it is illegal then 9 adds nothing.

Trial Examiner Greenberg: Without directing the discussion to an issue which may prove to be academic, let's confine ourselves, then, to the fact that the complaint does allege the invalidity of the contract which is here in question. I would take it that Paragraph 9, then, assuming for the sake of argument the invalidity of the contract, simply alleges a further act of assistance to the Amalgamated on the part of the respondents by the deductions which are mentioned in Paragraph 9.

Mr. Lund: By its only illegal act of assistance,

because the union shop may be invalid. You can't make two crimes out of one fact which makes an illegality.

Trial Examiner Greenberg: Its further detailed allegations of the further acts on the part of the respondent, which are alleged to be illegal. I think the statements of the [25] General Counsel further amplifies that, so I will deny the motion to strike Paragraph 9 of the complaint.

Mr. Lund: I have another motion. This one I think the Examiner will grant.

Pursuant to Section 102.24 of the Rules and Regulations, Series 5, Respondent Lee's Department store hereby moves the Board, acting through its duly designated Trial Examiner, to strike from the complaint herein the allegations in the following paragraphs, on the ground that a complaint based on such allegations is barred by the six months limitation period prescribed in the proviso in Section 10 (b) of the Act: All of Paragraphs 7, 8, 9, 12 and 14 and each of them and the reference in Paragraph 19 to subsection (2) of Section 8 (a) (2) of the Act. Upon the same grounds and with reference to the same allegations and charges, this respondent moves in the alternative, that the complaint be dismissed.

The complaint by way of argument—

Trial Examiner Greenberg: Excuse me just a moment before we get lost. In Paragraph 14—Paragraph 19, pardon me—is the reference to subsection (2), 8 (a) (2)?

Mr. Lund: That is right.

Trial Examiner Greenberg: All right, sir.

Mr. Lund: The complaint alleges in Paragraph 8 that invalidity of the contract on June 17th—pardon me, December 17, 1948. The charge herein was filed on June 17, 1949 [26] and was served on this respondent on June 21st—June 23, 1950. General Counsel's Exhibit 1-H, an affidavit of service of a copy of the charge on Lee's, shows that it was mailed on June 20th, return receipt showing delivery on June 23rd, and the 23 is crossed off and there is a 21 written in. Let's take the date 21st or June 20th for that matter. The contract having been executed December 17th, the charge having been filed June 20 of the following year is three days in excess of the six months period provided by the Statute of Limitations.

Now, it is clear that if this union shop provision is illegal, that we violated the Act when the contract was signed on December 17, 1948, as alleged in this complaint—that is in Julius Resnick, the Great Atlantic Tea Company case out of this region, and a number of other cases by the Board—and at that time the question of the illegality of the union shop provisions of this contract became actionable and the six months period began to run, after June 17, 1949, we submit that that contract could not be attacked.

So for that reason, as the first one, we think it is not within the statutory period and, secondly, the charge that was filed and that was served on us on or about June 23, 1949, makes no reference to any illegal union shop provision or contract, that is,

challenge or attack. Therefore, there isn't any charge forming the basis of that whole paragraph or complaint. [27]

Trial Examiner Greenberg: Which Exhibit here is the charge? There was only one charge in that case?

Mr. O'Brien: No amended in the Lee's case.

Mr. Lund: The Exhibit is G, is the original charge.

Trial Examiner Greenberg: Now, did you mis-speak inadvertently when you referred to the date of the execution of that contract as——

Mr. Lund: December 17th.

Trial Examiner Greenberg: I see it in the complaint as December 17th.

Mr. Lund: That's right.

Trial Examiner Greenberg: And the charge is dated June 17, 1949. Now, you are referring to the time of service upon——

Mr. Lund: It was filed June 17th and the affidavit was mailed on June 20th. According to the return receipt it was received June 23rd or June 21st, the return receipt is marked. That affidavit is General Counsel's Exhibit 1-H.

Trial Examiner Greenberg: All right. Now, Mr. O'Brien, did you wish to be heard?

Mr. O'Brien: This seems very simple to me, sir. On December 17, 1948, Lee's Department Store signed a closed shop contract with the union, kept it in effect for two days and then dropped it after the two days, and then six months later the charge had been filed and the statute of limitations would

run. But [28] this is a continuing violation. This contract once it was signed became binding upon the parties, and it is still binding upon the parties. The statute of limitations wouldn't start to run on that contract until such time as the parties disavowed it.

Mr. Lund: In other words, it never runs, according to that argument.

In that connection I want to call the Examiner's attention to the Goddal case, which involved somewhat the same problem, Case No. 20-CA-597, decided by the Board in October, 1949. There a 10-cent wage increase was challenged as having been given in violation of 8 (a) (1) to discourage membership in the union. The charge relative to it was filed some seven months after the wage increase was put into effect, and it was there alleged the wage increase was continuing with every week the employee gets that pay check. Recognizing that fact, they are discouraged from joining the union or continuing their membership in it. And the Board says, "Oh, no, six months from the time the wage increase was put into effect is the limitation period."

The fact that the effect of the illegality may continue to run after the six months doesn't change the application of the statute. After all, there is no point in the statute if it doesn't cut off the effect of illegality at some point.

Trial Examiner Greenberg: Does anyone else wish to be heard? [29]

This is the fourth of a series of motions addressed to me by the attorney for Respondent Lee's Department Store, the last of which one now under con-

sideration was prefaced with a fervent hope or expression of hope that he would have better luck with the fourth than he had with the first three. I therefore find it rather embarrassing to announce that I have decided to deny this motion as well. I do so with real regret, sir.

Mr. Lund: Well, there I will not bother taking exception, since exceptions are reserved. I am satisfied the Trial Examiner is inherent.

The next one I am willing to wager the Trial Examiner will grant.

Pursuant to Sections 102.23 and 102.24 of the Rules and Regulations of the Board, Respondent Lee's Department Store hereby moves the Board, acting through its duly designated Trial Examiner, to grant it permission to file an amended answer herein to the complaint as amended. We have not yet filed any answer to the complaint as amended.

Mr. O'Brien: No objection.

Trial Examiner Greenberg: The motion is of course granted.

Mr. Lund: May we go off the record for just one moment?

Trial Examiner Greenberg: Yes, sir. Off the record.

(Discussion off the record.)

Trial Examiner Greenberg: On the record. [30]

The attorney for the Respondent Lee's Department Store has indicated to me he has already prepared the amended answer which he was just given leave to file, and has asked opposing counsel whether they will waive verification of the answer by his

client since it is now inconvenient to find a notary public.

What is the position with respect to that of Mr. O'Brien?

Mr. O'Brien: Of course I am willing to either waive or acknowledge it as a Board agent.

Trial Examiner Greenberg: Then you will waive the requirement for verification.

And you, sir?

Mr. Gilbert: I understand that it has been read by one of Mr. Lund's clients and signed by him as true and correct, and upon that representation I also waive verification.

Trial Examiner Greenberg: As far as Mr. Rissman is concerned, I don't know whether you would be considered a party adverse.

Mr. Rissman: I would be willing to waive as necessary, but I don't know any rules and requirements to have it verified in the first place.

Trial Examiner Greenberg: Oh, yes; there are.

Mr. Lund: Not verified, but sworn.

Trial Examiner Greenberg: Then I will, in view of the waiving of that requirement by counsel, receive the amended [31] answer.

I ask the reporter to mark it as General Counsel's Exhibit 1-U, which would be the exhibit next in order, I believe, so that it can be made a part of the formal papers in this case.

(Thereupon the document above referred to was marked General Counsel's Exhibit 1-U for identification.)

Mr. Lund: I wonder if respective counsel would not stipulate on the record that they have been served copies of this answer.

Mr. Rissman: I will acknowledge service.

Trial Examiner Greenberg: Let the record show that the Trial Examiner has just seen copies of the answer being given to all counsel in the case.

If there are no objections, I will receive in evidence as General Counsel's Exhibit 1-U, the amended answer just filed by the Respondent Lee's Department Store.

(The document heretofore marked General Counsel's Exhibit 1-U for identification was received in evidence.)

Mr. Lund: I say now, Mr. Examiner, I was hoping my motion to sever might take care of this problem, but I have a commitment this afternoon for a hearing that was scheduled long before this matter came to my attention. And while it may not be necessary to refer to it again, I also have a commitment this coming Friday afternoon. So at the proper time I will move either to postpone the hearing this afternoon [32] or for a partial granting of my motion to sever. That if the Trial Examiner wants to go on this afternoon, I be directed that that is some part of the case not involving my client. I have no objection for the next two weeks on that basis.

Trial Examiner Greenberg: As to the latter part of your request, I suggest that at the first recess you take that up with counsel and find out whether

it is feasible to proceed this afternoon in your absence on matters in which your client would have no interest. If such arrangement could be made you would be willing to waive the requirement of your presence.

Mr. O'Brien: For the convenience of other parties here, and as I have indicated to everyone here, I intended to call Mr. Guyon as my first witness.

Do you want to go off the record?

Trial Examiner Greenberg: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Greenberg: On the record.

Mr. Ladar: It is not too important, but I want to be sure that you have in mind the point that I have in mind, and that is that the amended complaint was served on me after I had filed my answer. I haven't filed any answer to the amended complaint, and I would like to reserve the right to do it, or consider now that I deny generally and specifically each and all of the allegations on the amended complaint. If you want to do that to save some time—— [33]

Mr. O'Brien: That is as to General Counsel's——

Trial Examiner Greenberg: Then you would simply like to make as your amended answer your statement that you have just finished making orally on the record and rest upon that as your amended answer?

That certainly is acceptable to the Trial Examiner in the absence of any objection.

Mr. Ladar: And then I would also like to join in the motion that Mr. Lund made which was his fourth motion, except insofar as it relates to the date of filing of the charge. The charge in this case was filed on Federal Stores at an earlier date than it was upon Lee's. But there are other phases of his motion in which I would like the record to show that I join on behalf of Federal. I don't want to repeat any arguments.

I think also that I would like to join in the second portion of Mr. Lund's motion in which he asks that the complaint be dismissed because of the absence of an indispensable party. I would like to say also that I would like to add to his motion a request that the Board, through the Trial Examiner, order the CIO to be brought in on the ground that as an indispensable party justice cannot be done in this case without their presence. I will not argue; I will submit it to you.

Trial Examiner Greenberg: I would like to simply ask you this—and I will give you time to give your answer to it if [34] you would like—to have you point out to me what authority I would have to make such an order. As I say, we can wait until after the recess.

Mr. Ladar: I would like to delay you on that. As long as the record shows the motion.

Mr. Rissman: To the extent of those two motions, the one made by Mr. Lund and the one made by Mr. Ladar requiring any reply, I say we don't object to that portion of the motion which asks for the dismissal of the complaint. In fact, we join with

it. With respect to that portion where it says the Amalgamated is an indispensably party, I do not agree, first, as the Trial Examiner has indicated, the General Counsel would have no authority to issue a complaint without a charge having been filed. Secondly, the Amalgamated is not an indispensable party, because if the allegations of the complaint are sound and are sustained with respect to the contract, the Board would order the two respondents to cease giving effect to the contract. It wouldn't be necessary to have any order running against the Amalgamated as far as the invalidity of the contract is concerned.

Trial Examiner Greenberg: Off the record.

(Discussion off the record.)

Trial Examiner Greenberg: On the record.

With reference to Mr. Ladar's request that the record show that he joined in the motions made by Mr. Lund, if there [35] is no objection, the record may show, then, that Mr. Ladar did join in those motions or the portions of them as defined by counsel on the record. The Trial Examiner will, of course, allow the same automatic exceptions to stand to his adverse rulings to those motions on behalf of Mr. Ladar and his client as automatically accrue to the maker of the motions.

Is that satisfactory?

Mr. O'Brien: Yes, sir.

Trial Examiner Greenberg: We will now take a five-minute recess.

(Short recess taken.)

Trial Examiner Greenberg: The hearing will resume.

Mr. O'Brien: Mr. Guyon, would you take the stand, please.

FRANK R. GUYON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Greenberg: Would you please give us your full name and address.

The Witness: Frank R. Guyon, G-u-y-o-n, 2322 Observatory Avenue, Los Angeles.

Direct Examination

By Mr. O'Brien:

Q. You are a member of the California Bar, are you not, sir? A. Yes.

Q. And are you an officer of Credit Stores Association? [36] A. I don't—

Mr. Lund: I object to the question on the grounds it assumes a fact not in evidence, that there was such a thing as credit stores association.

Trial Examiner Greenberg: Sustained.

Mr. O'Brien: Thank you, Mr. Lund.

Q. (By Mr. O'Brien): Over what period of time have you represented Respondent Lee's?

A. Well, about 13 years, possibly.

Q. Thank you, sir. And over what period of time have you represented Respondent Federal?

A. About the same time.

Mr. O'Brien: Thank you, sir.

(Testimony of Frank R. Guyon.)

With that introduction I would like to invoke Paragraph 43 B of the Federal Rules of Civil Procedure and call Mr. Guyon for cross-examination.

Trial Examiner Greenberg: Very well.

Mr. Lund: I want to observe I don't think we are going to quibble as to what is cross-examination and what isn't of this witness. As I read 43 B in the Federal Rules of Civil Procedure this fellow doesn't come under it. He is not an officer, director, manager or agent. That is what it applies to.

Mr. O'Brien: It will develop if you wish me to qualify him. I have thorough confidence in this witness, and I think we all [37] do.

Trial Examiner Greenberg: Let's not quibble on the record. I have already ruled. Let's proceed.

Q. (By Mr. O'Brien): Now, Mr. Guyon, what is the Credit Stores Association?

Mr. Lund: I object to the question on the ground it assumes a fact not in evidence, that there is such a thing as the Credit Stores Association.

Trial Examiner Greenberg: Will you please ask that question first and satisfy Mr. Lund, Mr. O'Brien?

Mr. Lund: I am not trying to quibble or be technical. It is a vital point.

Q. (By Mr. O'Brien): Is there such a thing as a Credit Stores Association?

A. I don't believe there is.

Q. All right. Now, then, will you explain your answer, sir?

A. What do you mean?

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: Was there ever such an organization?

The Witness: An organization by that name was formed.

Trial Examiner Greenberg: When?

The Witness: 1937.

Trial Examiner Greenberg: Were you connected with it at any time?

The Witness: Yes. [38]

Trial Examiner Greenberg: In what capacity?

The Witness: I was named in the early years, about the time it was formed, as a secretary. Not elected, named as a secretary by the first board of directors.

Trial Examiner Greenberg: Was that a paid office?

The Witness: No, not at the time.

Trial Examiner Greenberg: What was the purpose of that organization?

The Witness: The purpose was to—I'll have to go back a little on that.

A certain number of member firms of the California Merchants Association decided—made agreements with some American Federation of Labor Unions. After those agreements were made, the Association, the forming of the Association, was a suggestion of mine because of the fact that other members of the Southern California Merchants Association wanted it to be very clear to everyone that this wasn't the Southern California Merchants Association that was involved in the union.

(Testimony of Frank R. Guyon.)

Now, also, in drawing up the purposes of the organization it was decided that as long as we had an organization—I say “we” referring to those stores that signed contracts with the American Federation of Labor unions—it would be a nice idea if those particular firms had an association which would give some power to their board of directors to arbitrate any [39] differences between the unions and the firms who had contracts with those unions.

The purpose of the Association, therefore, was to attempt to keep peaceful relations between the firms involved in that so-called Association and those unions.

Trial Examiner Greenberg: Was part of that purpose that the Association negotiate contracts with unions on behalf of its members?

The Witness: None whatsoever.

Trial Examiner Greenberg: Now, I was just at that point thoroughly confused about the existent or nonexistent organization. I wanted to get the thing clear in my mind. That's why I asked these few preliminary questions.

Now, it seems to me that whether or not that organization still exists, or existed at the time material named in the complaint, are facts which are susceptible to ascertainment. Somebody around here must know whether or not it exists, and I would suggest that the parties try to reach a stipulation of fact up to the point, at least, where the

(Testimony of Frank R. Guyon.)

contested issues begin so we can save some time. Now, does that suggestion sound fruitful?

Mr. Lund: I think it is a vital issue in the General Counsel's thinking. I see no possibility about stipulating.

Trial Examiner Greenberg: Anything——

Mr. Lund: I wouldn't say anything about the existence. [40] This witness says it doesn't exist.

Trial Examiner Greenberg: I guess you will have to go ahead and litigate the matter out.

I feel like you, Mr. Lund, I never cease trying.

Q. (By Mr. O'Brien): Mr. Guyon, did you have anything to do with the formation of Credit Stores Association? A. I entered into it.

Q. And that was in 1937, sir?

A. I believe it was in the latter part of 1937.

Q. And was that a corporation not for profit?

A. No corporation.

Q. Was there any formal document which members were required to sign?

A. They weren't required to sign anything. Some of them did sign a set of by-laws; others did not.

Q. And those by-laws were written when?

A. At the time the organization was formed.

Q. Were they written by you? A. Yes.

Q. And have you operated under those by-laws from the time of formation until the present time?

A. The question of definition of operation, I don't think we ever operated under them.

Q. Have you ever invoked those by-laws in any

(Testimony of Frank R. Guyon.)

proceeding before the Board? [41] A. Never.

Q. Never? A. Never.

Q. I may have to refresh your recollection, sir. Do you recall writing to Mr. Alden R. Taylor, Field Examiner for the Board?

A. At least once.

Q. On November 29, 1948, and enclosing therewith a copy of the by-laws of the Credit Stores Association, do you? A. Yes.

Q. And of that date did you consider those by-laws to be in effect?

A. No. I have come to the conclusion lately that they weren't in effect at all, and that the association hasn't been in existence for seven or eight years.

Q. And when did you come to that conclusion?

A. Just recently in reviewing in my mind the circumstances back in the history of these contracts, and so forth.

Q. In consultation with Mr. Lund, sir?

A. No, not at all.

Q. In consultation with me?

A. In consultation with nobody. Lying in bed and thinking back of things that have happened, trying to get a sequence of events.

Mr. O'Brien: Mr. Reporter, would you mark this document [42] for identification as General Counsel's Exhibit No. 2.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

(Testimony of Frank R. Guyon.)

Q. (By Mr. O'Brien): Mr. Guyon, I show you a document marked for identification as General Counsel's Exhibit No. 2 and ask you if you recognize it. A. I think I do.

Q. Was that typed in your office, sir?

A. I can't tell whether it was or not.

Q. You can't tell by looking at it, but it might help you if you saw the remainder of the communication which accompanied it. Would that help, sir?

A. No. I can't definitely identify this particular piece of paper. It might be copied several times.

Q. I see, sir.

A. It appears to be. If you want me to answer the question of what it appears to be to me, I would be glad to answer it.

Q. As of November 30, 1948, which is the date stamped on that document, you believe the organization was still in existence?

A. I don't believe I even gave it a thought one way or the other, because it had been going along for some years, drifting along making use of the name, and so forth, that I never gave it a thought until these matters began to come to the fore. I commenced to examine back and I ran into a certain set of circumstances that I vaguely thought of many times, and it became [43] a question in my mind then of trying to decide for myself whether it was still in existence. I came to the conclusion—I may be wrong—I came to the conclusion that

(Testimony of Frank R. Guyon.)

it hasn't been in existence since a certain set of facts occurred in 1941.

Q. 1941. What were those facts, sir?

A. May I refer to this?

Q. Certainly, sir.

A. In this document here—do you wish to name it?

Q. It is General Counsel's Exhibit No. 2 for identification, sir.

A. I said I answered your question before, stated I thought I could identify it, but you didn't say as what.

There was a provision in the by-laws of that Association which ran something like this:

“Membership in this Association shall be limited to firms doing a retail credit business in Los Angeles County and any such firm, as a condition to becoming a member of the Association, shall be required to sign, and thereby become a party to, the agreement of August 27, 1937, and any subsequent agreements made between the Credit Stores Association and/or its members on the one hand, and labor unions on the other hand.”

Now, in 1941, contracts with the A. F. of L. unions were up for renewal. I can't recall clearly one point of how many, but at least the majority of the members decided that they [44] could not come to agreement again with that union. They at that point—there was a difference of opinion and a

(Testimony of Frank R. Guyon.)

certain number of them signed contracts with the Amalgamated Clothing Workers; others did not.

Then some of those who had, shortly after—I have forgotten how long—some of those who had signed contracts with the Amalgamated, later dropped the contracts and signed with the A. F. of L. again.

Those happenings at the time caused a little commotion, differences of opinion, and so from that time on the by-laws were never invoked.

The other provision in the by-laws ran something like this:

“Duties of Directors: To decide all questions arising as to interpretation of any agreement made with the labor unions, to which the Association and its members are parties, and to enforce the performance by members of their obligations under such agreements, when such enforcement does not conflict with a decision by a joint committee of representatives of the Association and the union.”

That all seemed to end right there when certain numbers went over to the Amalgamated. There never after that was any attempt to even arbitrate on the part of the Association, nor its directors, nor did they undertake any other function in connection with those by-laws. There was never another [45] election of officers and directors after that so, therefore, there never was a formal meeting held after that of any kind.

(Testimony of Frank R. Guyon.)

I have been pondering over that, and in my honest opinion the Association actually became non-existent at that time.

Q. And prior to 1941 weren't you the only acting officer in the Association?

A. I don't know what you mean by acting officer. I have other employment; I wasn't their employee at the time. I think I was more acting officer than any other officer.

Q. You were secretary, were you not, sir?

A. Yes.

Q. And in 1941 who were the members of the Association?

A. Well, I don't know that I can recount them all, because several of them dropped out.

Q. I might be able to suggest something to you. Was Browns a member? A. Yes.

Q. Was Federal a member? A. Yes.

Q. And Federal then had three stores, or do you know? A. I can't be sure.

Q. You can't be sure?

A. The number of stores they have had has varied in the 22 years that I have been with the Southern California Merchants Association, so I couldn't be sure at that time. [46]

Q. And was Golden State a member?

A. Yes.

Q. Kay's a member? A. Yes.

Q. Lee's a member? A. Yes.

Q. And Star was a member? A. Yes.

(Testimony of Frank R. Guyon.)

Q. And you say the number of stores has varied? A. Are you speaking of——

Q. You don't know about these others?

A. Well, I think that at that time Federal was the only one that had more than one store in that group.

Q. You belong to the Southern California Merchants Association?

A. Manager of the association.

Q. Manager of the association for about 20 years. And what is the business of that, sir?

Mr. Lund: I object to the question on the grounds of incompetence, irrelevance and immateriality.

Mr. O'Brien: It's going to be very important, and I may as well lay the foundation now if that is the way.

Trial Examiner Greenberg: You say that the materiality of that line of questioning will appear shortly?

Mr. O'Brien: Well, if Mr. Lund has any questions I can [47] lay a foundation for that.

Mr. Lund: I can't possibly see the materiality. It might be.

Trial Examiner Greenberg: I have no way of knowing whether it is material or not, and I am going to rely on you, Mr. O'Brien, not to pursue a line of questioning which isn't relevant to the issues here.

I am going to overrule the objection for the time

(Testimony of Frank R. Guyon.)

being. I will be receptive to a motion to strike if the materiality doesn't soon appear.

Mr. O'Brien: Thank you, sir.

Q. (By Mr. O'Brien): Now, I have named Browns, Federal, Golden State, Kay's, Lee's, Star——

Trial Examiner Greenberg: There is a pending question which hasn't been answered.

Mr. O'Brien: I will withdraw the question with the Examiner's permission.

Trial Examiner Greenberg: Yes.

Q. (By Mr. O'Brien): Were there any other stores that you ever considered members of the Association? A. Yes.

Q. And who were they, sir?

A. Well, one of them was Victor Clothing Company, and one was Franklin Outfitting Company.

Q. Franklin?

A. Franklin. And Farley's—— [48]

Q. F-a-r-l-e-y-s?

A. Yes. I am quite sure there was another, at least one of them I am positive of—King Outfitting Company.

Q. And King Outfitting Company.

Now, what was it that all these people had in common?

A. Well, in relation to what, before or after?

Q. To their credit business, sir.

A. The Southern California Merchants Association was an association that they belonged to.

Q. And that was what, sir?

(Testimony of Frank R. Guyon.)

A. Primarily a credit bureau with some trade association functions with respect to effecting retail credit business.

Q. And what was the value to them of membership in the Southern California Merchants Association?

A. Interchange of credit information really. The interchanging point had the files, the credit files.

Q. If I may lead you a little bit, sir. All of these stores operate on the principle of either nothing down or a dollar down?

A. No, I wouldn't say that at all.

Q. What is it, sir?

A. I think I can say this, that the by-laws of the Southern California Merchants Association requires, as a condition of membership, that a retail firm do a portion, at least, of their business under an installment payment plan. But the [49] types of installment payment, of course, vary widely and some of the members of our Association at present would feel very much offended if we even called them an installment store, to say nothing of a no down payment and so forth.

It comprised, and still does comprise, perhaps, a vast majority of all firms in the city of Los Angeles and vicinity that do a substantial portion of their business on the installment credit plan.

Q. That is, this merchandise, I am referring now to the Southern California Merchants Association, that is a service granted to merchants who

(Testimony of Frank R. Guyon.)

sell a substantial portion of, shall we say, nondurable and nonreclaimable merchandise?

A. Well, part of that is correct, a service rendered. The Association is owned by the members.

Trial Examiner Greenberg: Just a moment. Isn't there enough—excuse me, sir.

Mr. O'Brien, isn't it enough for the purpose of this proceeding that the description already in the record stand, that this Association is made up of members who do have merchants who do a credit business; that the Association renders a service to them of acting as an exchange bureau for credit information? Do we have to go into details about it any further? I don't know what you have in mind. I am trying to save time here.

The Witness: I want to make it clear. [50]

Mr. O'Brien: No, this witness in his own words can describe perfectly the business of these clients.

Trial Examiner Greenberg: Hasn't it been sufficiently described so far for the purpose of this proceeding?

Mr. O'Brien: I would like to ask one or two more questions along the same line, Mr. Examiner.

Q. (By Mr. O'Brien): Isn't it a fact that none of the members of the Association could operate without a nation-wide credit hookup?

A. Which Association are you referring to, the Southern California Merchants Association?

Q. No, I am referring to the Credit Stores Association.

Mr. Lund: Just a minute. I am going to ob-

(Testimony of Frank R. Guyon.)

ject to the question as not within the pleadings of this case. I assume, from the question he is asking now, it bears on commerce, and he has got some commerce allegations in the complaint; nothing of this character whatsoever.

Mr. O'Brien: This is commerce.

Mr. Lund: You have got your commerce allegations. We are prepared to meet you.

Trial Examiner Greenberg: Overruled.

The Witness: I want to be sure before I answer the question whether he is—state that all of my answers prior to this one for some time have been assuming you were talking about Southern California Merchants Association. [51]

Q. (By Mr. O'Brien): That is right, sir. Now I am going to come back to Credit Stores Association——

A. Would you repeat the——

Q. ——and your six present members.

Mr. Lund: I object to that question on the grounds it assumes a fact that——

Trial Examiner Greenberg: When you say “present members” it is contrary to this witness’ testimony.

Mr. O'Brien: This might be a good place, Mr. Examiner, to identify another document.

Mr. Rissman: Has General Counsel’s Exhibit 2 for identification been offered?

Mr. O'Brien: It has not been offered.

Mr. Reporter, I ask you to mark for identification a mutilated document entitled “Agreement,”

(Testimony of Frank R. Guyon.)

entered into this 31st day of January, 1947, to become effective the 31st day of January, 1947, and continuing until the 31st day of January, 1949, as General Counsel's Exhibit No. 3. The mutilation on General Counsel's Exhibit No. 3 refers only to the elimination of the wage scale; and as General Counsel's Exhibit No. 4, a copy of an agreement dated December 17, 1948, to be effective to January 31, 1950, too.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 3 and 4 for identification.)

Trial Examiner Greenberg: That was dated December 17th of [52] 1948?

Mr. O'Brien: December 17, 1948, General Counsel's Exhibit No. 4, the document referred to in the complaint.

Q. (By Mr. O'Brien): Mr. Guyon, I show you General Counsel's Exhibit No. 3 for identification, and do you notice that certain portions have been cut off from it? Was that done in your office?

A. It appears to be.

Q. And on the second page a little square is cut out. Was that done in your office?

A. I don't recall that.

Q. You don't know?

A. Oh, yes, probably. I'll say probably.

Q. I don't know what is——

A. I know there was one copy of this that I clipped off in my office.

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: When you talk about the part that was cut off you are referring to the first page?

Mr. O'Brien: Part of the first page. Mr. Lund has assured me that he has a copy of the original document there in his file which he would like to submit. Is that right?

Mr. Lund: No. I would like to take your copy and conform it to the original by adding the names.

Mr. O'Brien: The signatures appear on General Counsel's Exhibit No. 3. Is that right? [53]

Mr. Lund: Yes. I am willing to stipulate to the foundation.

Mr. O'Brien: Thank you.

Q. (By Mr. O'Brien): Was this a document which you submitted to the National Labor Relations Board? A. I think so.

Q. Now, referring again to General Counsel's No. 3, you will note the names there of six different stores. Who negotiated that contract?

A. Which contract?

Q. General Counsel's No. 3.

A. Oh, I can remember about the last ones better than this one. This is 1947. However, they are all negotiated in recent years by more or less casual conversations in the beginning between representatives of the union and a store and another store, and with me and another store. You get out to one store and talk until it finally leads back to a point where the union and the stores come into agreement, and I would then draft the contract and

(Testimony of Frank R. Guyon.)

take it around to these members to sign it if they please—they didn't have to sign it if they didn't please—and that was probably made in the same fashion.

Q. This is General Counsel's Exhibit No. 4 which I am showing you now, and that is the contract of the 17th day of December, 1948. Was that signed in about the same way, sir? [54]

A. Well, I can remember the circumstances much more clearly on that.

Q. If you will give us the details of the signing of the contract of December 17th, which is General Counsel's Exhibit No. 4.

A. I would like to give a little background.

Q. If you would, sir.

A. The representative of the Amalgamated union, Mr. Glasman, mentioned on several occasions in the latter part of 1948 that some of the members of their union, employees of some of these stores, had been urging him to obtain an increase in wages for them, and so forth, on the new contract.

Trial Examiner Greenberg: You say he mentioned it to whom?

The Witness: To me. And he also stated to me that he had mentioned it at various stores where he was calling. It was all very casual in the beginning, and the old contract wasn't to expire until January 31st of the following year.

However, it developed that I would be obliged to go to a session of the State Legislature in January. We had a legislative representative, but that

(Testimony of Frank R. Guyon.)

year he was in bad physical condition and it made it necessary for me to be there much more frequently and more steadily, perhaps, than if he hadn't been in that condition.

So Mr. Glasman and I finally decided about the end of [55] November, somewhere along in there, that we would see if we couldn't get an agreement in shape prior not only to the January session but prior to the Christmas rush, two weeks before Christmas if possible, because at that time of the year the Southern California Merchants Association, of course, is many times busier than at any other season of the year; we add 200 per cent to our force, for example, of girls.

So I finally got some of the representatives of the stores in my office and told them that Mr. Glasman was in accord with me that if we could get this contract under way and finished before Christmas, it would be acceptable to him. So we had a little discussion there—the complaint of the members of the union, according to Mr. Glasman, was that the prevailing scales in Los Angeles which had been steadily rising, of course, were considerably above in many cases—and perhaps in most cases—than under the terms of the old contract.

So that I mentioned to whatever there were of these members present at this little meeting, and they asked me if I would try to gather data on the prevailing scales.

Trial Examiner Greenberg: Who asked you?

(Testimony of Frank R. Guyon.)

The Witness: Those members present at the meeting.

Trial Examiner Greenberg: Members of what?

The Witness: Well, I—everybody that I represent I speak of as members because the Southern California Merchants Association has about 100 stores, 90 to 100, and if there could [56] have been assumed an association called Credit Stores existed at that time then these people are also members of Credit Stores Association. The representative of the union was not present.

So I set about and did gather considerable data on the prevailing wage scales in retail stores, not just credit stores, but retail stores, and got some of those same persons at another meeting a few days later—I don't remember how long. In the meantime, I had drawn up on one of these contracts a translation of these scales I picked up, some of which were by the hour and some by the day. The contract here was——

Mr. Lund: I wonder if I might interrupt. I don't think we are interested in all the details of how the contract was set up so far as the figures and rates and so on are concerned. I think we are getting far afield.

Trial Examiner Greenberg: Well, I will ask the witness to confine himself to describing the way this contract was negotiated and signed.

The Witness: I have just reached that point. I just wanted to make the circumstances clear.

At the second meeting, the scales were consid-

(Testimony of Frank R. Guyon.)

ered and tentatively approved by each of those present.

Trial Examiner Greenberg: Who was present?

The Witness: Some of these firms, these firms on this [57] contract, their representative or owner was otherwise present.

Trial Examiner Greenberg: And who else?

The Witness: And me.

Trial Examiner Greenberg: The representative of the union was not present at the time?

The Witness: No, sir.

Trial Examiner Greenberg: And what did you decide on at that time, what wage scale you would offer to the union?

The Witness: That's about it.

Trial Examiner Greenberg: All right, sir.

The Witness: Now, that's what was done. I had a conference with Mr. Glasman and we went over it in detail and he finally accepted the list I had drawn up there opposite these prevailing rate scales. I went over that with him, too, and he expressed satisfaction with it and said it was O.K. with him.

I drew up a new contract and had mimeographed copies made of it.

I am quite sure I phoned all or part of these firms concerned and told them that Mr. Glasman said it would be acceptable to him and that I was mailing them—some of them were delivered, I suppose—copies of the proposed contract.

Trial Examiner Greenberg: Now, when you say

(Testimony of Frank R. Guyon.)

you had copies of the contract mimeographed——

The Witness: Yes, copies of the draft. [58]

Trial Examiner Greenberg: Who actually mimeographed it?

The Witness: The stenographer of the Southern California Merchants Association.

Trial Examiner Greenberg: In the office of the Southern California Merchants Association?

The Witness: Credit Stores Association never had an office.

Trial Examiner Greenberg: Was there any arrangement made—well, let me ask you this: Did the Credit Stores Association ever have a separate treasury?

The Witness: Treasury?

Trial Examiner Greenberg: Yes, money.

The Witness: Well, yes. They started out there—I wouldn't call it a treasury. They started out in the beginning to put \$5.00 a month into the treasury, as you call it, and it was used for some stamps and a few letterheads—we had 100 printed—and envelopes, never reprinted them.

Trial Examiner Greenberg: As I understand your testimony up to date now, I am trying to get clear just what this organization was or is.

The Credit Stores Association—just check me and see if I am correct—when it was formed consisted of a number of firms of retail credit stores who all belonged to the Southern California Merchants Association.

The Witness: That is right. [59]

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: And who formed a separate organization because, as distinguished from the rest of the members of the Southern Merchants Association, the members who comprised the Credit Stores Association carried on negotiations and had dealings with unions.

The Witness: The members did, yes, sir.

Trial Examiner Greenberg: Is that correct?

The Witness: Yes.

Trial Examiner Greenberg: Did you at all times act as the representative of the Credit Stores Association?

The Witness: Well, there was no function of the Credit Stores Association, even in the beginning, that I could represent them on. The only function——

Trial Examiner Greenberg: You just described some event, I take it, that happened in December of 1947?

The Witness: Yes.

Trial Examiner Greenberg: These negotiations with Mr. Glasman who represented the Amalgamated?

The Witness: Yes.

Trial Examiner Greenberg: Now, you did some talking to him, some negotiating with him, and you finally had a contract drawn up or submitted to him, didn't you?

The Witness: I am trying to distinguish between Association and individual members.

Trial Examiner Greenberg: You did that. All

(Testimony of Frank R. Guyon.)

of these negotiations and dealings with Mr. Glasman of the Amalgamated, [60] you didn't do that on your own behalf, did you?

The Witness: I did it on behalf of the individual firms who were at one time members of the Credit Stores Association.

Trial Examiner Greenberg. You did it on behalf of the signatories of this contract?

The Witness: That is right.

Trial Examiner Greenberg: Now, as for the conclusion that you have just stated you did it on their behalf as individuals rather than on their behalf as members of Credit Stores Association, that is merely your conclusion, that is the conclusion that you draw?

The Witness: So far as this contract is concerned, they——

Trial Examiner Greenberg: Well, I just wanted to get it for the record.

I am noting my awareness of the fact that the response to my last question constitutes a conclusion on the witness' part.

The Witness: Whatever answer I made wouldn't necessarily apply to both of these.

Mr. Rissman: When the witness says "both of these," may we have the documents identified?

Trial Examiner Greenberg: He pointed first to General Counsel's Exhibit 4 and then to General Counsel's Exhibit 3, [61] the two contracts in question.

(Testimony of Frank R. Guyon.)

The Witness: The circumstances are not the same in each one. They are quite different.

Trial Examiner Greenberg: I don't care to argue with you about them, sir. I am trying to clear up certain things in my mind. I want to know exactly what took place.

Those are all the questions I have. I am sorry to interrupt.

Q. (By Mr. O'Brien): Well now, again, this will start a new line of inquiry, sir, but we will put it in this way: Does Lee's customarily furnish to you evidence of the amount of business that it does in its store?

(No response.)

Q. (By Mr. O'Brien): It does not?

A. No, sir.

Q. And does Federal customarily furnish to you information as to the amount of business in its store? A. No.

Q. And the same would be true of Brown's, Golden State, Kay's and Star? A. Yes, sir.

Trial Examiner Greenberg: What was the response to the last question?

Mr. O'Brien: "Yes, sir."

Q. (By Mr. O'Brien): You do not customarily in your capacity [62] either as attorney or secretary negotiate, or in any capacity ordinarily get statements from your clients as to what business they are doing?

(Testimony of Frank R. Guyon.)

A. Not unless we request it?

Q. But if you do request it such information is furnished to you upon request?

A. Such as I have asked for, I guess has been furnished to me.

Q. And you recall, of course, making such a request in November of 1948?

A. About that time.

Q. At Mr. Taylor's request.

A. About that time.

Q. Mr. Taylor being the field examiner for the National Labor Relations Board?

A. Yes, I recall.

Q. Did Mr. Taylor tell you why he wanted that information?

A. Oh, yes, sir. He said he wanted commerce data. He specified what he wanted.

Mr. O'Brien: Mr. Reporter, will you mark this document for identification, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

Mr. O'Brien: I have had marked for identification as General Counsel's Exhibit No. 5, a copy of the petition in [63] Case No. 21-RC-56596, filed on October 27, 1948, naming the employer as Lee's Department Store and the Petitioning Union as Retail Clerks International Association of the A. F. of L.

Q. (By Mr. O'Brien): I show you General

(Testimony of Frank R. Guyon.)

Counsel's Exhibit No. 5 for identification, sir. I have already identified it very briefly, but was that the case in which you submitted this information to Mr. Taylor?

Mr. Lund: I am going to object, Mr. Examiner. I don't like to keep on objecting, but I can't see the materiality of any of this. Apparently the witness furnished information to the field examiner of the Board; it doesn't make any difference in what connection of the case.

Trial Examiner Greenberg: Overruled.

The Witness: Well, as I recall it, there were two separate cases affecting Lee's Department Store. I don't know.

Q. (By Mr. O'Brien): One was the union authorization case; this is a petition for representation, sir. Do you recall what disposition was made of that case?

Mr. Lund: I object to that on the ground it is incompetent, irrelevant and immaterial.

Trial Examiner Greenberg: Sustained.

Mr. Gilbert: May I have the question back?

Trial Examiner Greenberg: The question was "Do you recall what disposition was made of that case." [64]

Q. (By Mr. O'Brien): Did you represent Lee's Department store in that proceeding, the representation case?

A. That's the first of the two cases?

Q. That is right, sir.

(Testimony of Frank R. Guyon.)

A. Well, I will have to have you define what you mean by "represent."

Q. Did you appear before Mr. Taylor at a conference? A. I appeared, yes, sir.

Q. Did you make statements on behalf of Lee's Department Store?

A. I answered whatever questions I think that Mr. Taylor had, and some that Mr. Gilbert asked.

Q. And did you subsequently get a letter from Mr. Taylor saying that the case was dismissed?

Mr. Lund: Wait a minute. He is asking the same question the Examiner sustained my objection on a little earlier.

Trial Examiner Greenberg: I will overrule that objection there. I will allow the answer to that. I think it is material only insofar as it goes to whether or not this witness received any communication in connection with the disposition of the case in connection with the proceedings, as a representative of Lee's Department Store.

The Witness: I probably saw a copy of that, but I know one never came to my office to me, nor to the Credit Stores Association. [65]

Q. (By Mr. O'Brien): None came to you, nor to your office. Is that right, sir?

A. To the best of my recollection.

Mr. O'Brien: Then I will have to ask Mr. Lund to ask his client to produce a copy of the letter of dismissal.

Mr. Lund: I assume you have it in your file.

(Testimony of Frank R. Guyon.)

Mr. O'Brien: I have a copy, but I don't have a good one.

Mr. Lund: Mine doesn't show a copy to Mr. Guyon.

Mr. O'Brien: May I see it, sir?

Maybe we can stipulate the second paragraph of this letter.

Mr. Lund: No. It is immaterial in this proceeding.

Mr. O'Brien: You say it is immaterial.

Mr. Examiner: I think the remainder of our commerce information can be better elicited through Mr. Gisser who is here from San Francisco, and Mr. Keen whose office is, fortunately, in Los Angeles. I think we have fairly well exhausted this witness' recollection.

Could we go off the record here and decide what we can do this afternoon?

Trial Examiner Greenberg: Off the record.

(Discussion off the record.)

Trial Examiner Greenberg: On the record.

Q. (By Mr. O'Brien): Mr. Guyon, I show you a letter [66] which I am having identified as General Counsel's Exhibit 6, dated February 28, 1950, showing purchases and percentages of out-of-state of Star Stores, Kay's Department Store, Brown's Golden State Department Store.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

(Testimony of Frank R. Guyon.)

Q. (By Mr. O'Brien): Was that information furnished to you at your request?

A. It was.

Q. And you believe it to be true?

A. I haven't any idea.

Q. You just don't know, but it was furnished?

A. I asked for certain information and I got it. I didn't ask anybody to swear to it. I don't know if it is true or not.

Mr. O'Brien: Then I suggest a stipulation among all the parties that the information contained in Mr. Guyon's letter, which is General Counsel's Exhibit No. 6, is true.

Mr. Lund: We will so stipulate, with the reservation, however, that we object to the materiality and competency of the evidence. We stipulate to the facts. With that objection we don't think the stipulation should be received because the evidence is incompetent, irrelevant and immaterial.

Mr. Ladar: Same stipulation and objection.

Trial Examiner Greenberg: Other counsel? [67]

Mr. Rissman: No objection.

Mr. Gilbert: No objection.

Trial Examiner Greenberg: Do you stipulate?

Mr. O'Brien: I will stipulate that the matter contained therein is substantially true. Of course, I believe they are material and relevant.

Trial Examiner Greenberg: The stipulation is received. I take it, then, there is no objection to the receipt in evidence of General Counsel's Exhibit No. 6, subject to the objection stated by counsel for the two employers in this case.

(Testimony of Frank R. Guyon.)

Mr. Lund: I don't know that the letter adds anything.

Trial Examiner Greenberg: I will receive General Counsel's Exhibit 6 and thereby overrule the objection as to the materiality.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 6

Frank R. Guyon
Attorney at Law
Suite 511 Lincoln Building
Los Angeles
Trinity 4177

February 28, 1950.

National Labor Relations Board,
111 West 7th St.,
Los Angeles, 14, Calif.

Attn: Mr. Cherry
Case No. 21-CA-420 and
No. 21-CA-481.

Gentlemen:

In accordance with your request I have obtained the following approximate estimates from the firms listed below:

(Testimony of Frank R. Guyon.)

	Total Purchases in 1949	% of Total From Out of California
Star Stores	\$400,000	18%
Kay's Dept.	725,000	28%
Brown's	404,000	15%
Golden State Dept.	225,000	33%

Very truly yours,

/s/ F. R. GUYON.

FRG/h

Received March 1, 1950.

Mr. Lund: I wish the Trial Examiner would say in overruling our objection you are not making a predetermination on this vital point.

Trial Examiner Greenberg: I don't feel called upon to make that announcement, sir, because by receiving a portion of the data which the General Counsel is offering on the question of commerce, I can't conceive of myself giving any indication of predetermining that issue. I can assure you that I have an entirely open mind on the question of the jurisdictional issue here and am open to conviction on either side. [68]

Mr. O'Brien: Before we adjourn for lunch and before I forget, I would like to offer General Counsel's Exhibits 2, 3, 4 and 5 in evidence.

Mr. Lund: Wait until we see—what is 2?

Trial Examiner Greenberg: No 2 is the bylaws; 3 and 4 the agreements, 5 the copy of the petition in the RC case—

(Testimony of Frank R. Guyon.)

Mr. Lund: No. 5, the petition in the RC case, we strenuously object to it as not being relevant in this case. Respondent Lee's has no objection to General Counsel's 3 and 4.

Trial Examiner Greenberg: 2, 3 and 4, did you say?

Mr. Lund: 3 and 4. I object to No. 2 only on this ground; I happen to know, George, of at least one inaccuracy in the document. If it purports to be the bylaws, subject to our being able to correct that inaccuracy, I don't object.

Mr. O'Brien: I would be very happy if you would.

Mr. Lund: Do you want to admit it as far as you can admit it, subject to that correction?

Trial Examiner Greenberg: Do you have any objection to its receipt?

Mr. Ladar: I join in the objection just made.

Mr. Rissman: No objection.

Mr. Gilbert. None.

Trial Examiner Greenberg: Then General Counsel's Exhibits 2, 3 and 4 are received in evidence, and subject to [69] the reservations on that, as made by counsel of the two respondents to correct an asserted inaccuracy in General Counsel's Exhibit No. 2; is that correct?

Mr. Lund: That is correct.

(The documents heretofore marked General Counsel's Exhibits Nos. 2, 3 and 4 for identification were received in evidence.)

(Testimony of Frank R. Guyon.)

GENERAL COUNSEL'S EXHIBIT No. 2

By-Laws of the
Credit Stores Association

The name of the Association shall be Credit Stores Association.

It shall be a non-profit Association.

Article I.

The purposes for which the Association is formed are:

(a) To promote and protect the welfare and interest of retail installment merchants;

(b) To maintain among its members a standard of ethics which will elevate retail installment firms in the eyes of the public;

(c) To promote friendly relations between member firms and their employees;

(d) To aid members in the adjustment of disputes with Labor Unions;

(e) To insure cooperation and collective bargaining of members with Labor Unions when necessary to protect any member or members from strikes or other harassment by Unions;

(f) To promote friendly cooperation in all matters of importance to its members.

Article V.

Power of Directors

The Directors shall have the power:

1st. To conduct, manage and control the affairs

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 2—(Continued)
and business of the Association, and to make rules and regulations, not inconsistent with these By-Laws, for the guidance and management of the affairs of the Association.

2nd. To assess members for funds required for the conduct of the business of the Association.

3rd. To make all contracts which are proper and necessary to carry on the business of the Association. Any action of the Board of Directors is subject to review, instruction, alteration, amendment or repeal by a two-thirds vote of all the members of this Association.

4th. To call special meetings of the Association when they deem it necessary. And they shall call a special meeting upon the written request, stating the reason for such meeting, of at least five members who are in good standing.

5th. To appoint and remove, at pleasure, all agents and employees of the Association, prescribe their duties, fix their compensation, and require of them securities for faithful service.

6th. To decide all questions arising as to interpretation of any agreement made with the Labor Unions, to which the Association and its members are parties, and to enforce the performance by members of their obligations under such agreements, when such enforcement does not conflict with a decision by a Joint Committee of representatives of the Association and of Unions.

The decision of a majority of the Board of Di-

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 2—(Continued)

rectors on such matters shall be binding upon all members, except that within three days after notice of such a decision, any member or members concerned in the decision may, upon written notice to the Board of Directors, appeal such decision to the members-at-large at a special meeting called for that purpose. The decision of a majority of a quorum of members present at such a meeting shall be final and binding as to the question involved.

Any member failing to fulfill all of his obligations with respect to any agreement made with the Labor Unions and to which such member and the Association are parties, and in accordance with the interpretation of such agreements by the Board of Directors of the Association, or by the vote of the members at a special meeting as aforesaid, shall be subject to immediate expulsion from the Association by vote of a majority of the Board of Directors. Upon such expulsion, the Labor Unions concerned shall be promptly notified by the Association of the expulsion.

7th. The Board shall have the power to call any member before it for questioning on matters pertaining to Union agreements referred to in paragraph 6, or on any business pertaining to the Association, and it shall be compulsory for such member to be present at the time and place designated by the Board, and to answer all questions and inquiries and make explanation concerning the business for which said member was summoned.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 2—(Continued)

Article XI.

Membership

Membership in this Association shall be limited to firms doing a retail credit business in Los Angeles County and any such firm, as a condition to becoming a member of the Association, shall be required to sign, and thereby become a party to, the agreement of August 27, 1937, and any subsequent agreements made between the Credit Stores Association and/or its members on the one hand, and Labor Unions on the other hand.

Applications for membership must be in writing from applying firm, designating the person in its organization who shall represent said firm in the Association and accompanied by check for the entrance fee.

Upon election to membership, the member shall sign the By-Laws.

The vote of a member or in his absence, the vote of a person duly authorized by proxy from member firm to act in place of said member, shall be binding on the member firm so represented.

Membership in this Association cannot be transferred or assigned, except by vote of the Board of Directors such membership certificate may be transferred, and the transferee made a member in lieu of the last former holder.

Received November 30, 1948.

(Testimony of Frank R. Guyon.)

GENERAL COUNSEL'S EXHIBIT No. 3

Agreement

This Agreement made and entered into this 31st day of January, 1947, by and between signatory members of Credit Stores Association (said members being hereinafter referred to as Employers) as parties of the First Part and Amalgamated Clothing Workers of America, Local Union No. 81, affiliated with Congress of Industrial Organizations, party of the Second Part, hereinafter referred to as the Union, all parties being located in the County of Los Angeles, in the State of California:

Witnesseth:

In consideration of the mutual promises herein contained, the parties hereto agree as follows:

Article I.

Recognition

The undersigned Employers shall recognize the Amalgamated Clothing Workers of America, Local Union No. 81, as the sole collective bargaining agency for all of their employees and shall negotiate with the accredited representatives thereof in that capacity.

Article II.

Salary and Commission Guarantees

Retroactively effective beginning Oct. 1, 1946.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)

Alteration Department Employees

Per Hour

Fitters, markers, bushelmen, pressers (male)

Female finishers on men's garments

Alteration workers, women's garments

*[Note: Portion of page containing hourly rates cut out.]

Minimum Wages

No employee in any of the classifications covered by this agreement shall be paid less than a minimum wage of sixty cents per hour.

Classification of work

The nature of the work occupying the majority of the time of any employee shall determine the classification of work and the wage scale applicable to such employee.

Article III.

Working Hours and Overtime Pay

On January 1, 1947, all of the following conditions shall also become effective:

1. The above minimum salary and commission guarantees shall apply to a work week of forty-four hours. If an employee works more than forty-four hours during any week, by mutual consent of employer and employee, he shall receive extra pay for the extra time worked, at the rate of time and one-half.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)

2. On one day only each week, male employees may be worked more than eight hours but not to exceed 11 hours, without payment of the overtime rate, provided that the time worked in excess of 8 hours on that day shall be offset by giving a corresponding amount of time off on some other day or days during the same week. Each work day shall be continuous except for normal meal periods.

3. However, except during a period of one week immediately preceding Easter and of two weeks immediately preceding Christmas, each employee shall be entitled to time off each week, during one morning or one afternoon, for four consecutive hours not including his own normal meal hours.

4. During the one week preceding Easter and the two weeks preceding Christmas, male employees may be worked 52 hours per week, but work in excess of 44 hours per week during those weeks shall be paid for at the rate of time and one-half.

5. Transactions with customers taking place at the normal closing time of the particular Employer's store shall be completed by such employees as are actually necessary for the purpose, without pay for such extra time, up to 30 minutes only.

6. Overtime work for the sole purpose of taking inventory at customary periods, shall be compensated by time off instead of by salary. This time off shall be within the next sixty days after such

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)
work is performed, the date to be selected by the employer except that it must be for consecutive hours and in the day time. The length of time off shall be one and one-half times as much as the hours worked by the employee on the inventory. The employer shall notify the employee three days in advance of the days designated for such time off.

7. All work done on Sundays and on the following legal holidays shall be paid for at the rate of time and one-half: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. When an employee does not work on a recognized legal holiday, he shall nevertheless be paid for such holiday on the basis of an 8-hour day at straight time, except when such holiday falls on a Sunday.

Article IV.

Guarantees Defined

The guarantees specified in Article II represent the total compensations employers agree to pay to their respective employees in the form of salaries or commissions or a combination of salaries and commissions.

Any compensation not customarily designated by the employer as salary or wages, but which is paid on All merchandise of any particular classification sold by a salesperson, shall be considered as a com-

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)
mission whether paid on a percentage basis, or by specified sums of money.

The employer may, at his option, grant P.M.s, "Spiffs," bonuses or other forms of extra compensations, which shall not be considered as commissions as defined above.

Where an employee's total earnings in a month are in excess of his salary and commission guarantee, deductions for absence from his work may be made from such total earnings, but shall be a proportionate amount of guaranteed earnings only.

Article V.

Membership in Union

1. Members of the Employers' families, store managers, one head bookkeeper, one stenographer-secretary, and bona fide department heads who have the duty of directing the work of two or more employees in their respective departments, shall not be subject to the jurisdiction of the Union and shall be excepted from all provisions of this agreement.

2. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees at present employed in the classifications specified in Article II shall become members of the signatory Union within fifteen (15) days after the effective date of this agreement or shall be discharged by the Employer.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)

3. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees in the classifications specified in Article II and who are hired after the effective date of this agreement shall become members of the signatory Union within 30 days after the date of their employment or shall be discharged by the Employer.

Article VI.

Apprentices

1. An apprentice is a person with less than one year's experience in the classification of work for which he is employed. Each employer shall give apprentices credit for any apprenticeship time served with previous employers in the particular classification of work for which they are hired.

2. Only one haberdashery apprentice shall be employed for each five clothing salesmen and haberdashery salesmen combined, except that where less than five of such salesmen are employed one haberdashery apprentice may nevertheless be employed.

3. In all other classifications, one apprentice may be employed for each five journeymen in a particular classification, except that where less than five journeymen are employed in any classification one apprentice may nevertheless be employed.

4. Where there is an apprentice haberdasher employed, the next person employed in the clothing or haberdashery department shall be a clothing

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)

salesman and thereafter haberdashery and clothing salesmen shall be alternately employed until there are six of such salesmen, at which time an additional haberdashery apprentice may be Employed; except, where it is mutually agreed between an Employer and the Union that a different proportion is necessary for the conduct of the particular business of that Employer. Haberdashery salesmen and apprentices may sell men's clothing when all of the regular clothing salesmen are busy or off the floor.

Article VII.

Payment of Compensation

1. Salaries shall be paid once every week or twice each month, on a designated day.

2. Commissions and P.M.s, if any, earned by salespeople of any classification, shall be computed and paid within one week after the end of each month, for such month, and no deductions shall be made from such commissions and P.M.s to apply against regular salaries payable during preceding or subsequent months.

3. Compensation in excess of guaranteed scales shall not be applied to the payment of wages for overtime, nor shall time off be given to an employee in lieu of overtime pay except as provided in paragraph six of Article III.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)

Article VIII.

Vacations

Each year, all employees who have been in the employ of the same Employer for a period of one year or more, computed during the normal vacation season, shall receive one week's vacation with pay during that season; and those who have been in the employ of the same Employer for less than one year and for more than six months, computed during the normal vacation season, shall receive three days' vacation with pay during that season.

Any employee who has qualified for a vacation but is discharged during the normal vacation season and prior to receiving his vacation, shall receive his vacation pay. The normal vacation season shall be considered as June, July, and August of each year, unless otherwise designated by the Employer.

Article IX.

Modification Option

In the event that the Union should make another agreement, with any employer, either before or after signing this agreement, containing any wage scales, working hours or conditions more favorable to such employer than wage scales, working hours or conditions contained herein and applicable to the same classifications of employees, the signatory Employers may, at their option, require the

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)
Union to immediately modify this agreement to conform with such more favorable wage scales, working hours and/or conditions.

Article X.

Arbitration

It is agreed by the parties hereto that all misunderstandings, disputes, claims or questions arising between the Employers and the Union shall be determined by the terms of this agreement. It is further agreed that any differences of opinion between the parties as to the interpretation and effect of this agreement which cannot be reconciled by discussions between the parties or their authorized representatives, shall be submitted to a board of arbitration consisting of an equal number of persons representing the Employers and the Union, respectively, and those persons in turn shall select an impartial chairman acceptable to both parties to the controversy, with the understanding that his decision on all questions at issue shall be final and binding upon the parties concerned.

In the event that representatives of the Employers and the Union should at any time fail to agree upon the selection of an impartial chairman, the Superior Court of Los Angeles County shall be requested by either party to the controversy to appoint such a chairman and the parties agree to accept such appointment, sharing equally the expense of the compensation of such chairman.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)

It is further agreed that prior to and during negotiations or arbitrations there shall be no lock-outs by Employers, nor strikes, walk-outs nor picketing of the Employers with the sanction of the Union and the Union undertakes specifically to prevent strikes, walk-outs or picketing on the part of members of the Union.

Article XI.

Individual Responsibility

It is understood that this agreement is executed by the Employers severally, that no signatory Employer shall be liable for any breach of this agreement by any other Employer and that no default or breach by any Employer shall constitute a default or breach by any other Employer.

Article XII.

Duration of Agreement

This agreement shall become effective on the 31st day of January, 1947, and shall continue until the 31st day of January, 1949; except, upon written request by either of the parties hereto to the other, not less than thirty days prior to January 31, 1948, the parties hereto shall negotiate during the month of January, 1948, with respect to adjustments of wages and hours for the period from February 1, 1948, to January 31, 1949, and with

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 3—(Continued)
respect to extending the duration of this agree-
ment to January 31, 1950.

MEMBERS OF CREDIT STORES ASSOCIA-
TION

BROWN'S,

By CHARLES BROWN.

STAR OUTFITTING CO.,

By H. N. MOORE.

FEDERAL STORES,

By SIG. GOLDSTEIN.

GOLDEN STATE DEPT.
STORE,

By S. KRANTZ.

KAYS DEPARTMENT
STORES,

By ROBERT ROSENSON,

LEE'S DEPT. STORE,

By W. L. KEEN.

AMALGAMATED CLOTHING WORKERS OF
AMERICA, LOCAL UNION No. 81, Affiliated
With Congress of Industrial Organizations

By A. S. GLASMAN,
District Representative.

(Testimony of Frank R. Guyon.)

GENERAL COUNSEL'S EXHIBIT No. 4

Agreement

This Agreement made and entered into this 17th day of December, 1948, by and between signatory members of Credit Stores Association (said members being hereinafter referred to as Employers) as parties of the First Part and Amalgamated Clothing Workers of America, Local Union No. 81, affiliated with Congress of Industrial Organizations, party of the Second Part, hereinafter referred to as the Union, all parties being located in the County of Los Angeles, in the State of California:

Witnesseth:

In consideration of the mutual promises herein contained, the parties hereto agree as follows:

Article I.

Recognition

The undersigned Employers shall recognize the Amalgamated Clothing Workers of America, Local Union No. 81, as the sole collective bargaining agency for all of their employees and shall negotiate with the accredited representatives thereof in that capacity.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

Article II.

Total Minimum Compensation Guaranteed
(See Article IV.)

Effective Beginning Feb. 1, 1949

	Experienced Per Month	Apprentices Per Month
Men's Clothing Salesmen		
1 years experience	\$250.00	
Haberdashery Salesmen		
After 1 years experience.....	200.00	
Apprentice		\$175.00
Shoe Salesmen	200.00	
Salesmen, Furniture and Major Appliances	250.00	
Salesmen, Small Appliances and Miscellaneous	150.00	
Salesladies, Coats and Suits.....	160.00	
Salesladies, All Other Merchandise.....	140.00	
Collectors and Tracers		
After 2 years experience.....	235.00	
After 1 years experience.....	200.00	
Apprentice		175.00
Application Takers and Miscellaneous Credit and Collection Office Clerks		
After 1 years experience.....	160.00	
Apprentice		135.00
Verifiers		
After 1 years experience.....	160.00	
Apprentice		135.00
Office Clerks, Except Credit and Collection Dept.	145.00	
Office Clerks, Apprentice, Except Credit and Collection Dept., for One Year....		130.00
Alteration Department Employees		
Fitters, Markers, Bushelmen, Pressers (Male).....	\$1.50 per hour	
Female Finishers on Men's Garments.....	1.00 per hour	
Alteration Workers, Women's Garments.....	.90 per hour	

Classification of Work

The nature of the work occupying the majority of the time of any employee shall determine the

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)
classification of work and the compensation applicable to such employees.

Article III.

Working Hours and Overtime Pay

1. Overtime Work

If an employee works more than forty-four hours during any week, by mutual consent of employer and employee, he shall receive extra pay for the extra time worked, at the rate of time and one-half.

2. Division of Hours

On one day only each week, male employees may be worked more than eight hours but not to exceed 11 hours, without payment of the overtime rate, provided that the time worked in excess of 8 hours on that day shall be offset by giving a corresponding amount of time off on some other day or days during the same week. Each work day shall be continuous except for normal meal periods.

3. Time Off

However, except during a period of one week immediately preceding Easter and of two weeks immediately preceding Christmas, each employee shall be entitled to time off each week, during one morning or one afternoon, for four consecutive hours not including his own normal meal hours.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

4. Holiday Season Hours

During the one week preceding Easter and the two weeks preceding Christmas, male employees may be worked 52 hours per week, but work in excess of 44 hours per week during those weeks shall be paid for at the rate of time and one-half.

5. Completing Transactions

Transactions with customers taking place at the normal closing time of the particular Employer's store shall be completed by such employees as are actually necessary for the purpose, without pay for such extra time, up to 30 minutes only.

6. Inventory Work

Overtime work for the sole purpose of taking inventory at customary periods, shall be compensated by time off instead of by salary. This time shall be within the next sixty days after such work is performed, the date to be selected by the employer except that it must be for consecutive hours and in the day time. The length of time off shall be one and one-half times as much as the hours worked by the employee on the inventory. The employer shall notify the employee three days in advance of the days designated for such time off.

7. Sunday and Holiday Work

All work done on Sundays and on the following legal holidays shall be paid for at the rate of time and one-half: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)
Christmas Day. When an employee does not work on a recognized legal holiday, he shall nevertheless be paid for such holiday on the basis of an 8-hour day at straight time, except when such holiday falls on a Sunday.

Article IV.

Minimum Compensation Guarantees Defined

The guarantees specified in Article II represent the total minimum compensations employers agree to pay to their respective employees in the form of salaries or commissions or a combination of salaries and commissions.

Any compensation not customarily designated by the employer as salary or wages, but which is paid on All merchandise of any particular classification sold by a salesperson, shall be considered as a commission whether paid on a percentage basis, or by specified sums of money.

The employer may, at his option, grant P.M.s, "spiffs," bonuses or other forms of rewards, which shall not be considered as part of guaranteed minimum compensations defined above.

Where an employee's total earnings in a month are in excess of his salary and commission guarantee, deductions for absence from his work may be made from such total earnings, but shall be a proportionate amount of guaranteed earnings only.

Article V.

Membership in Union

1. Members of the Employers' families, store

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

managers, one head bookkeeper, one stenographer-secretary, and bona fide department heads who have the duty of directing the work of two or more employees in their respective departments, shall not be subject to the jurisdiction of the Union and shall be excepted from all provisions of this agreement.

2. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees at present employed in the classifications specified in Article II shall become members of the signatory Union within fifteen (15) days after the effective date of this agreement or shall be discharged by the Employer.

3. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees in the classifications specified in Article II and who are hired after the effective date of this agreement shall become members of the signatory Union within 30 days after the date of their employment or shall be discharged by the Employer.

Article VI.

Apprentices

1. An apprentice is a person with less than one year's experience in the classification of work for which he is employed. Each employer shall give apprentices credit for any apprenticeship time served with previous employers in the particular classification of work for which they are hired.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

2. Only one haberdashery apprentice shall be employed for each five clothing salesmen and haberdashery salesmen combined, except that where less than five of such salesmen are employed one haberdashery apprentice may nevertheless be employed.

3. In all other classifications, one apprentice may be employed for each five journeymen in a particular classification, except that where less than five journeymen are employed in any classification one apprentice may nevertheless be employed.

4. Where there is an apprentice haberdasher employed, the next person employed in the clothing or haberdashery department shall be a clothing salesman and thereafter haberdashery and clothing salesmen shall be alternately employed until there are six of such salesmen, at which time an additional haberdashery apprentice may be employed; except, where it is mutually agreed between an Employer and the Union that a different proportion is necessary for the conduct of the particular business of that Employer. Haberdashery salesmen and apprentices may sell men's clothing when all of the regular clothing salesmen are busy or off the floor.

Article VII.

Payment of Compensation

1. Salaries shall be paid once every week or twice each month, on a designated day.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

2. Commissions and P.M.s, if any, earned by salespeople of any classification, shall be computed and paid within one week after the end of each month, for such month, and no deductions shall be made from such commissions and P.M.s to apply against regular salaries payable during preceding or subsequent months.

3. Compensation in excess of guaranteed scales shall not be applied to the payment of wages for overtime, nor shall time off be given to an employee in lieu of overtime pay except as provided in paragraph six of Article III.

Article VIII.

Vacations

Each year, all employees who have been in the employ of the same Employer for a period of one year or more, computed during the normal vacation season, shall receive one week's vacation with pay during that season; and those who have been in the employ of the same Employer for less than one year and for more than six months, computed during the normal vacation season, shall receive three days' vacation with pay during that season.

Any employee who has qualified for a vacation but is discharged during the normal vacation season and prior to receiving his vacation, shall receive his vacation pay. The normal vacation season shall be

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)
considered as June, July, and August of each year,
unless otherwise designated by the Employer.

Article IX.

Modification Option

In the event that the Union should make another agreement, with any employer, either before or after signing this agreement, containing any wage scales, working hours or conditions more favorable to such employer than wage scales, working hours or conditions contained herein and applicable to the same classifications of employees, the signatory Employers may, at their option, require the Union to immediately modify this agreement to conform with such more favorable wage scales, working hours and/or conditions.

Article X.

Arbitration

It is agreed by the parties hereto that all misunderstandings, disputes, claims or questions arising between the Employers and the Union shall be determined by the terms of this agreement. It is further agreed that any differences of opinion between the parties as to the interpretation and effect of this agreement which cannot be reconciled by discussions between the parties or their authorized representatives, shall be submitted to a board of arbitration consisting of an equal number of per-

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

sons representing the Employers and the Union, respectively, and those persons in turn shall select an impartial chairman acceptable to both parties to the controversy, with the understanding that his decision on all questions at issue shall be final and binding upon the parties concerned.

In the event that representatives of the Employers and the Union should at any time fail to agree upon the selection of an impartial chairman, the Superior Court of Los Angeles County shall be requested by either party to the controversy to appoint such a chairman and the parties agree to accept such appointment, sharing equally the expense of the compensation of such chairman.

It is further agreed that prior to and during negotiations or arbitrations there shall be no lock-outs by Employers, nor strikes, walk-outs nor picketing of the Employers with the sanction of the Union and the Union undertakes specifically to prevent strikes, walk-outs or picketing on the part of members of the Union.

Article XI.

Individual Responsibility

It is understood that this agreement is executed by the Employers severally, that no signatory Employer shall be liable for any breach of this agreement by any other Employer and that no default or breach by any Employer shall constitute a default or breach by any other Employer.

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

Article XII.

Duration of Agreement

This agreement shall become effective on the 1st day of February, 1949, and shall continue until the 31st day of January, 1951; except, upon written request by either of the parties hereto to the other, not less than sixty days prior to January 31, 1950, the parties hereto shall negotiate during the month of January, 1950, with respect to adjustments of wages and hours for the period from February 1, 1950, to January 31, 1951, and with respect to extending the duration of this agreement to January 31, 1952.

MEMBERS OF CREDIT STORES ASSOCIATION

STAR OUTFITTING CO.,

By H. N. MOORE,
President.

FEDERAL STORES,

By SIG. GOLDSTEIN.

GOLDEN STATE DEPT.
STORE,

By S. KRANTZ.

KAYS DEPT. STORE,

By ROBERT ROSENSON,

(Testimony of Frank R. Guyon.)

General Counsel's Exhibit No. 4—(Continued)

LEE'S DEPT. STORE,

By W. L. KEEN.

BROWNS,

By CHARLES BROWN.

AMALGAMATED CLOTHING WORKERS OF
AMERICA, LOCAL UNION No. 81, Affiliated
With Congress of Industrial Organizations,

By A. S. GLASMAN,

District Representative.

Trial Examiner Greenberg: Now, that leaves General Counsel's Exhibit 5. I ask Mr. O'Brien for what purpose he would offer it. What is the materiality.

Mr. O'Brien: The next thing that will come in through another witness is the disposition of the case. I found I did not have a competent witness on the stand.

Trial Examiner Greenberg: Do you want to have your offer remain pending?

Mr. O'Brien: My offer may remain pending.

Mr. Gilbert: Do I understand, Mr. Examiner, that Mr. Guyon has merely been withdrawn from the stand temporarily because of the difficulties of postponement, and that he will be available for additional examination?

Trial Examiner Greenberg: I don't know what Mr. O'Brien's intentions are in that respect.

Mr. O'Brien: I intend to call Mr. Guyon for a few more questions tomorrow morning, depending on the convenience of counsel.

Trial Examiner Greenberg: Mr. Guyon will be available to [70] testify further. [71]

* * *

Trial Examiner Greenberg: The hearing will be in order.

Mr. Lund: I want to make a motion at this time, Mr. Examiner.

Trial Examiner Greenberg: Yes, sir.

Mr. Lund: I want to renew the third motion I made yesterday, the motion to strike Paragraph 9 of the Complaint, and renew it because we received in this morning's mail a copy of the latest issue of the Labor Relations Reporter dated March 6, 1950, Volume 25, No. 35.

At page 1391 thereof, you see the recent decision in the case of Salant and Salant, Inc., No. 15NC3, 88 NLRB 156, decided February 27, 1950.

I think it is a decision squarely in point along the lines of the argument which I made yesterday in referring to this check-off violation, that Section 302 of the Taft-Hartley Act has no bearing, meaning or significance so far as unfair labor practices are concerned, and the Board explicitly so states.

Consequently, in this case the Board holds that where the so-called illegal assistance to a union in violation of 8 (a) (2) consists of the adoption of a

union security provision which is invalid because of lack of the necessary authorizations, the check-off is not an additional illegal assistance under those circumstances, and does not form the [139] basis of any unfair labor practice.

On the basis of this decision, which is squarely in point, we submit that Paragraph 9 of the Complaint relative to the check-off should now be ordered stricken.

Mr. Gilbert: May we have that citation again?

Mr. Lund: Salant and Salant, Inc., 88 NLRB 156, 25 Labor Relations Manual, 1391.

Mr. O'Brien: Mr. Examiner, I am familiar with this Salant and Salant case from a long time back, and I see no reason to change my argument on it at all; that this particular provision of the Complaint to which Mr. Lund seemed to object is only a further particularization of the allegation of support to the Amalgamated.

Mr. Lund: This whole case makes the point that it is not an illegal setup where the check-off provision is illegal only by reason of the union security provision.

Trial Examiner Greenberg: I don't think we ought to argue the point at great length. You have made your positions clear. I shall content myself with saying that I wish to read Paragraph 9 of the Complaint, to which your motion addressed to Section 302 of the Act as Amended went, again and see if there is anything, any necessary interpretation in that paragraph which would lead to the necessity of

depending upon Section 302 as support for the allegation of illegality of the check-off. [140]

Mr. Lund: You only understand half of it. I mean, the other half is—and this case so holds, while I am not going to quote directly from the decision which Mr. Gilbert is looking at—the Board says that the check-off is not illegal under the National Labor Relations Act, only where it is illegal assistance to a company-dominated union.

And the Board goes on to say where the so-called assistance, or the union which is company-dominated assistance, or the union which is company-dominated, was assisted by virtue of an illegal union shop violation of the Act and, therefore, no averment of unfair labor practice can be based upon any allegations of check-off, because they said the only illegality is in the union security provision. The check-off, which is perfectly valid if the union security provision is valid, does not constitute an independent violation.

I want to take time to read just about two sentences in that case:

“As already indicated there is nothing in the nature of a check-off agreement which is per se illegal in violation of Section 8. In fact, we have generally held in all of these situations, where it was connected with an organization that was company dominated, the practices are alleged to be the practices of company-dominated unions or who for some other reason do not represent an uncoerced majority of the employees. [141]

“In the instant case we find that respondent coerced its employees in violation of 8 (a) (1) and has given assistance and support to the A. F. of L. in violation of 8 (a) (1) solely through its renewal and continuance thereafter of the illegal union security clause in its contract with the A. F. of L.”

That is exactly the situation here. The only illegality charged against us insofar as the C.I.O. is concerned is the continuance of that illegal provision in the contract.

The Board concludes:

“We find therefore that the respondent is charged under Section 8 (a) (1) and 8 (a) (2), is alleged to have violated the Act by the renewal and continuance thereof on and after September, 1947.”

In other words, the check-off under the Wagner Act is legal and it only becomes subject to complaint when it is in aid of a company-dominated union or an illegally assisted union. And the Board in this particular case goes on to hold along the lines of the argument I made yesterday where the illegal assistance consists only of a union security provision, that the check-off is not an additional violation because if the union security provision is valid the check-off would be valid.

Trial Examiner Greenberg: I will reserve ruling on the renewal of your motion and will pass upon it in my intermediate [142] report.

Mr. Ladar: I join in the motion and the renewal

of it as I did yesterday. I think he is 100 per cent correct in the point he is making, and we would like to have the same motion.

Trial Examiner Greenberg: Same ruling.

Mr. O'Brien: Before I recall the witness, Mr. Lund has handed me this morning a correction, an extra page for one of the Board's Exhibits. May I have the exhibits?

Mr. Lund: It is No. 2, George.

Mr. O'Brien: I suggest that this document be marked as General Counsel's 2-B, and I request that General Counsel's Exhibit 2-B be received in evidence as a substitute for page 3 of General Counsel's Exhibit 2.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2-B for identification.)

Mr. O'Brien: Before that I would like the privilege of showing this comparison to the witness presently on the stand.

FRANK R. GUYON

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. O'Brien:

Q. I show you this, General Counsel's 2-B.

A. That looks more familiar to me than this did

(Testimony of Frank R. Guyon.)

yesterday. [143] I was very much astonished when I read this yesterday, because I thought of one thing——

Q. By this, you mean page 3 of No. 2?

A. Yes, that one of the strongest indications in my mind that the Credit Stores Association, as such, ceased to exist was because in my mind it was yesterday, but after reading this over I didn't want to say it that way, I mean that it was predicated on a bylaw provision that said that the condition of membership such as it is stated here now was——

Q. Referring now to General Counsel's Exhibit 2-B?

A. Yes. Our condition of membership was not only that they should become parties to an agreement dated August 27, 1937, as I read to you yesterday, but went further, made between Credit Stores Association and its members on the one hand and Los Angeles Central Labor Council of the American Federation of Labor and various local unions under the jurisdiction of that council on the other hand. Those were the—that was the unions—or members of this association were required to sign and when they failed to sign them again the entire purpose of the association was defeated, and the association became virtually nonexistent and the members went on with their functions or other things without regard to that requirement for membership.

Mr. O'Brien: Thank you. Mr. Examiner, I wonder whether the record shows this is the same Mr. Guyon who was previously [144] sworn and testified yesterday?

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: Let the record so show.

Did you want to offer that in evidence?

Mr. O'Brien: I would like to exhibit that to counsel here before I offer it.

Mr. Lund: This paragraph has no change, George, I might say.

Trial Examiner Greenberg: This is off the record.

(Discussion off the record.)

Trial Examiner Greenberg: On the record.

Mr. O'Brien: I offer General Counsel's Exhibit 2-B in evidence.

Trial Examiner Greenberg: Is there any objection? If not, General Counsel's Exhibit 2-B is received in evidence.

It is my understanding that it is the agreement of counsel that General Counsel's 2-B is a correct version of the bylaws of the association, and is to be considered as substituted as Page 3 of General Counsel's Exhibit 2, that page embodying an inaccurate version of the bylaws.

(The document heretofore marked General Counsel's Exhibit No. 2-B for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 2-B

County and any such firm, as a condition to becoming a member of the Association, shall be required

(Testimony of Frank R. Guyon.)

to sign, and thereby become a party to, the agreement of August 27, 1937, made between the Credit Stores Association and its members on the one hand, and the Los Angeles Central Labor Council of the American Federation of Labor and various Local Unions under the jurisdiction of that Council, on the other hand.

Applications for membership must be in writing from applying firm, designating the person in its organization who shall represent said firm in the Association and accompanied by check for the entrance fee.

Upon election to membership, the member shall sign the By-Laws.

The vote of a member or in his absence, the vote of a person duly authorized by proxy from member firm to act in place of said member, shall be binding on the member firm so represented.

Membership in this Association cannot be transferred or assigned, except by vote of the Board of Directors such membership certificate may be transferred, and the transferee made a member in lieu of the last former holder. [145-A]

Mr. Lund: That is my understanding.

Mr. Gilbert: So understood.

Mr. O'Brien: Perfectly all right, sir.

Q. (By Mr. O'Brien): Now, I think you testified in rather [145] complete detail regarding the negotiations for the December 17, 1948, contract.

(Testimony of Frank R. Guyon.)

There isn't anything you want to add to that, is there?

A. I don't remember everything I said yesterday, unless I am reminded or my recollection is. Perhaps Mr. Lund wants me to tell something further. I don't know what I can think of to add to it.

Q. Before you obtained the signatures of these various parties to the contract, had you been advised that the representation cases and the union security cases filed by the Clerks had been dismissed?

Mr. Lund: Just a moment. I object to the question on the ground he is trying to inject in this record the disposal of the two R cases. That is irrelevant and immaterial to this proceeding.

Mr. O'Brien: I intend to do that, sir.

Mr. Lund: We think it is irrelevant and immaterial, and for that reason I object to the question.

The Witness: Will you repeat it, please?

Mr. Lund: Wait until I get a ruling on it.

Trial Examiner Greenberg: You say that you contend that the R case disposition is material to the issues here?

Mr. O'Brien: I certainly do.

Trial Examiner Greenberg: What is the materiality of it? [146]

Mr. O'Brien: Because——

Mr. Lund: May I interrupt, because in arguing what the materiality is, he is going to probably disclose what the results were, and that is just the

(Testimony of Frank R. Guyon.)

thing we don't want to get out. May I say this——

Trial Examiner Greenberg: The results are no secret. They are a matter of public record.

Mr. Lund: They won't be secret in your mind anyway. We would just as soon that you ask what the results were. I assume you are going to do it, but our objection is that they are really not material in this proceeding.

Trial Examiner Greenberg: I don't know how I can rule intelligently on the objection unless I know what General Counsel is leading to. I am certain you will have to give me credit for enough mental discipline so that I do not decide this case on irrelevant and immaterial facts.

Mr. Lund: I want to say by way of observation I feel I am justified in my interpretation of his reason for offering this evidence. The regional attorney in that proceeding made a determination of an issue which is now presently before this Board, and I can see no necessity whatsoever of bringing that record in unless Mr. O'Brien wants to argue that it is persuasive evidence. The mere fact that the Regional Director made a ruling and determined an issue which is before this Board I think is irrelevant and immaterial, and I think the [147] Trial Examiner will agree with me 100 per cent that the Regional Director's determination of any issue now before this Board is not material. The mere fact that he has filed this complaint here certainly shows that he feels they have to decide that question.

Trial Examiner Greenberg: Mr. Lund, what you

(Testimony of Frank R. Guyon.)

fear is that I will be unduly influenced by some disposition that the Regional Director made. I think I am enough of a lawyer that I shall not rely in making a determination of the issues in this case upon matters which are not material. If I do commit that error, I am afraid you will just have to have recourse to the normal process of appeal.

I am going to let Mr. O'Brien tell me why he thinks this is material.

Mr. O'Brien: This is material as to the matter of jurisdiction, and I say that is serious, and that is why Mr. Lund is objecting so strenuously here.

Trial Examiner Greenberg: Just what—you say a representation petition was filed that was administratively determined at some stage of its development in the regional office here?

Mr. O'Brien: That is right, sir.

Trial Examiner Greenberg: How do you think that that has any bearing upon the issue here?

Mr. Lund: If I may interrupt again, let's suppose for [148] illustration we say that the Regional Director in that proceeding determined that the Board had jurisdiction over Lee's. That can't have any influence on this case as evidence of the Board's jurisdiction.

Trial Examiner Greenberg: I don't think that you can say if he does prove that that I have got to take it.

Mr. Lund: That is along the line of his approach.

Mr. O'Brien: No, it is not. I am making no

(Testimony of Frank R. Guyon.)

claim at all that the Regional Director's determination is binding upon the Board or upon this Trial Examiner.

Trial Examiner Greenberg: Not even contending that it is persuasive?

Mr. O'Brien: It is not even persuasive, but it is important in showing that Mr. Guyon in negotiating for his clients did rely at least in part——

Trial Examiner Greenberg: On the assumption that they were in commerce and subject to the jurisdiction of the Board?

Mr. O'Brien: Upon the Regional Director's disposition of the prior case.

Trial Examiner Greenberg: I don't think that has anything to do with the issues in this case. I will sustain the objection.

Mr. O'Brien: I will have to come back to the same thing in another way then. I am awfully sorry.

Q. (By Mr. O'Brien): Now, during what period of time, [149] Mr. Guyon, have you negotiated for Lee's Stores?

A. Well, I have entered into numbers of negotiations ever since 1937.

Q. And in connection with Lee's Stores did you ever request a showing that the Amalgamated represented a majority of the employees of Lee's?

Mr. Lund: Just a moment. I am going to object to that on the ground it is incompetent, irrelevant and immaterial. There is no allegation in this complaint relating to the matter of majority. If he pro-

(Testimony of Frank R. Guyon.)

poses to challenge that it did not represent an uncoerced majority, then we will object because that is not put in issue in the pleadings.

Mr. Rissman: I will join in that objection.

Trial Examiner Greenberg: Mr. O'Brien?

Mr. O'Brien: I just want to know whether he has ever required of his client——

Trial Examiner Greenberg: What is the materiality of that? The pleadings certainly raise no issue of the majority status of the Amalgamated at the time the contract was entered into. Do the pleadings raise such an issue?

Mr. O'Brien: It is raised automatically as a matter of law.

Mr. Lund: No, it is not. He alleges——

Trial Examiner Greenberg: All right. Let us not argue it any further. I will sustain the objection—did you want [150] to be heard? Excuse me, Mr. Gilbert.

Mr. Gilbert: I very definitely wanted to be heard. There is an allegation here in Paragraph 14 that by the acts set forth in 8 and 9, namely, the execution of the agreement and the continuation of the check-off, there is a violation of 8 (a) (1), (2) and (3) of the Act, and I submit that by him incorporating the terms of the statute in that sense, the question of whether or not—the only way we can determine whether or not the company lent illegal assistance to the union is to find out whether the union was in fact the statutory bargaining rep-

(Testimony of Frank R. Guyon.)

representative of the employees within the meaning of Section 9 (a) of the Act.

Mr. Lund: I want to be heard further.

Trial Examiner Greenberg: Just one minute, please. I would like to look at the complaint.

Mr. Gilbert: I don't think there is any question about it, Mr. Trial Examiner.

Mr. Rissman: May I be heard also, Mr. Greenberg?

Trial Examiner Greenberg: Yes, sir. We will let everybody be heard.

Mr. Gilbert: I would like to add just one additional fact, in calling your attention to Paragraph 8, that the allegation is the respondents enforced and gave effect to the agreement and, in the conjunctive, they required membership in the Amalgamated Clothing Workers of America as a [151] condition of employment.

Trial Examiner Greenberg: I think I can settle this matter. Excuse me for cutting you off. I just want to ask the representative of the General Counsel whether it is the contention of the General Counsel in this case that at the time of the execution or renewal, if any, of the agreement between respondents and the Amalgamated, the Amalgamated was not the duly designated bargaining representative of the employees covered by that agreement?

Mr. O'Brien: I can answer that question in this way, sir: It is the contention of General Counsel that if I were permitted to ask proper questions of this witness he would testify that at no time did

(Testimony of Frank R. Guyon.)

he ever request any showing of majority either of any of his individual clients or his clients collectively.

Trial Examiner Greenberg: That isn't what I asked you at all. I asked you whether you are raising the contention in this case that the contract was entered into between the employers and the union which was not the duly designated representative of the employees covered by the contract.

Mr. O'Brien: I am not so charging.

Trial Examiner Greenberg: Then why do you want to ask the question which is now pending? What materiality does it have?

Mr. O'Brien: Because it will show, I think, that the [152] witness presently on the stand, although he has testified that his organization was—well, practically it is out of business, that when the facts actually came up, when the question was raised as to whether or not the unit was appropriate for collective bargaining, he regarded the organization as being in existence; now when a charge is filed he finds the organization is dead. I am sure that this witness can explain that.

Mr. Rissman: What difference would the explanation make if he could explain it, in view of the fact that there is no charge or no allegation in the complaint here?

Trial Examiner Greenberg: I just don't understand what you are getting at Mr. O'Brien, as to what relationship, if any, there is between the

(Testimony of Frank R. Guyon.)

majority status of the Amalgamated and the existence or nonexistence of the organization.

Mr. O'Brien: Well, in outline, suppose I put it this way: I think there can be no question on the state of the record as it stands now that Federal is engaged in interstate commerce.

Trial Examiner Greenberg: I understand why the existence or nonexistence of the Association is important in this case, so don't trouble yourself to cover that point, but I don't see what relationship there is between the pending question and that issue.

Mr. Gilbert: I think that there is some confusion in [153] this situation. I would like just a moment, without even necessarily going off the record, to confer with Mr. O'Brien. I will state that the reason for the request is that the charge filed in this matter is predicated upon the definite position of charging that the Amalgamated Clothing Workers of America never has been the bargaining representative of the employees of either Federal or Lee's, and this coming as a statement by the attorney for the General Counsel comes as a complete surprise to me.

Mr. Rissman: Well, assuming that the charge states as Mr. Gilbert has said, we are proceeding upon the complaint and not upon the charge. Apparently the Regional Director considered that portion of the charge and decided it had no merit.

Trial Examiner Greenberg: I think, Mr. O'Brien, you are going to have to take a position that you are raising that issue or that you are not.

(Testimony of Frank R. Guyon.)

If you are not raising that issue, I certainly don't want to suggest that you do. I just want to say we will just confine ourselves to the issues which have been raised. There is no use going into the matter of the majority status of the Amalgamated, because I can't see that it has any bearing on the other issues. If you would like a recess to consider the matter, I am willing to give you one.

Mr. O'Brien: General Counsel has tried to keep this issue within the period of the statute of limitations here. [154] I think it would be very clear from the testimony of this witness that the Amalgamated was never designated by the employees either in the individual stores or in the collective stores.

Trial Examiner Greenberg: What you are hinting at is you are precluded by the statute of limitations from raising that issue?

Mr. O'Brien: That is what I am saying.

Trial Examiner Greenberg: Well, then let us not go into it.

Mr. O'Brien: But it is the matter of commerce that I want to bring in here now.

Trial Examiner Greenberg: You haven't made it clear by what you said what that has got to do with commerce. I don't understand that. I am perfectly willing to give you another opportunity to explain what relationship there is between the commerce issue and whether or not the union was a majority representative.

Mr. Gilbert: I would like to request a five-minute recess, Mr. Trial Examiner.

(Testimony of Frank R. Guyon.)

Mr. Lund: Before we recess, I would like to make one comment.

Trial Examiner Greenberg: I don't think I am granting a recess right at this moment.

Mr. Gilbert: Mr. Trial Examiner, it seems to me the [155] position in this matter by you is that the charging party has no interest in the proceeding. That seems to be the view of the Trial Examiner.

Trial Examiner Greenberg: Not at all, sir.

Mr. Gilbert: The fact of the matter is this, that as I understand the function and the rights provided by the Rules and Regulations to the charging party in a proceeding, rights which any court recognizes, they have that duty, I will say, speaking now on the matter of private litigation, and I think I am as familiar with that as the Trial Examiner. The fact of the matter is that I think you have a right to protect our rights, but the position of the charging party in this proceeding is that the issue of whether or not the Amalgamated was the constituted bargaining representative or was not when the agreement in question was entered into goes definitely to the issue of the charge of contravention of Section 8 (a) (2) of the Act which was contained in the charge, and which was accepted and incorporated as an allegation in the complaint. There was a definite 8 (a) (2) allegation in this complaint as there was in this charge, and I am surprised at this particular point by the fact that the complaint which to me alleges very plainly, as I called to the attention of the Trial Examiner, that the complaint

(Testimony of Frank R. Guyon.)

specifically alleges that by executing the contract and by maintaining the check-off the respondents have engaged in [156] unfair labor practices within the meaning of Section 8 (a) (2)——

Trial Examiner Greenberg: On that one point—excuse me, will you, please? I just want to save time?

I am going to overrule the objection, in view of what you have just said, and I hope you don't feel hurt by my interrupting you, but in view of your comment I don't think further argument is necessary.

Mr. Gilbert: I agree with you.

Trial Examiner Greenberg: I think despite the fact that the issue of the majority status of the union, let us say the legality of the contract as being affected by the majority status or non-majority status of the Amalgamated at the time it was entered into cannot be raised because of the statute of limitations, the statute of limitations is not, however, a rule of evidence, and that any evidence in regard to the status of the union at the time the contract was entered into would be material on the issue, for example, of the legality of the check-off provision, and that therefore it is part of the whole picture of illegal assistance which is alleged in the complaint.

I think I am going to reverse my ruling and allow the testimony to be given.

Mr. Rissman: Except, Mr. Greenberg, the paragraph 8 of the complaint specifically spells out——

(Testimony of Frank R. Guyon.)

Mr. Lund: Exactly. [157]

Mr. Rissman: —the manner in which the General Counsel believes that it is illegal, specifically spells out the manner in which he believes assistance was given to the Amalgamated. No place in the complaint is any question raised about the majority status of the union. The only question before the Examiner, the only question raised by the pleadings, is whether or not it was improper for these respondents to enter into a union shop contract with the Amalgamated. No question is raised as to whether they had a right to enter into any agreement at all. As Mr. O'Brien stated earlier, he is not raising that question and can't raise that question. I don't think he should be able to go into it at this time, in connection with his claim that it has a bearing on the case.

Trial Examiner Greenberg: I am allowing the question to be asked, and the matter of the status of the Amalgamated to be gone into here, as bearing on the 8 (a) (2) allegations in the complaint.

Mr. Lund: I am still going to throw in two thoughts here. I feel an allegation of the complaint has been completely overlooked.

Trial Examiner Greenberg: All right, sir.

Mr. Lund: That is the allegations of Paragraph 12, where the General Counsel says the effect of Paragraph 8 of the complaint is that the union security provisions, at least in [158] this whole contract, were illegal. There is an allegation in connection with 9 (e) of the act in there.

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: That is right. I am accepting this testimony as bearing not on the legality or illegality of the contract itself, but as bearing on the whole picture of alleged assistance to the Amalgamated.

Mr. Lund: I think you ought to point out the fact which is in the record that as of the date that this contract was signed, which is December 17, 1948, there was then in effect a valid contract with a union shop provision, under which the great majority of the employees had to be members of this union. That contract was signed before the Amendment to the Act in June of 1947.

Trial Examiner Greenberg: Between the Amalgamated and the——

Mr. Lund: C.I.O., which is General Counsel's Exhibit 3 in the record here.

Trial Examiner Greenberg: I will receive it as a fact to be taken into consideration, and I will certainly do so.

Proceed, Mr. O'Brien.

Mr. O'Brien: There is a question pending, Mr. Trial Examiner.

Trial Examiner Greenberg: I remember what the question was, if you don't mind my restating it.

Mr. O'Brien: Quite all right, sir. [159]

Trial Examiner Greenberg: When you were negotiating the contract with the respondents, the contract in question being the one signed on December 17, 1948, did you at any time request the representative of the Amalgamated for any proof that his

(Testimony of Frank R. Guyon.)

union represented a majority of the employees in the firms covered by the contract?

Mr. Ladar: He didn't ask about all the firms, did you Mr. O'Brien?

Mr. O'Brien: No.

Trial Examiner Greenberg: No, I say Lee's and Federal Stores.

Mr. Ladar: Just a minute. Insofar as Federal is concerned, I object to that question upon the ground that it is incompetent, irrelevant and immaterial, and that since the Trial Examiner has disclosed his basis for allowing the question is that the Board has charged violation of Section 8 (a) (2), I would like to call your attention to the fact that Paragraph 15 of the complaint, in striking contrast with the allegations in the last of Paragraph 14, does not even charge Federal with a violation of Section 8 (a) (2), but Section 8 (a) (1) and (3).

Mr. Gilbert: I call counsel's attention to Paragraph 14, which charges Federal.

Mr. Ladar: Is Federal mentioned in there?

Trial Examiner Greenberg: In 14, yes. [160]

Mr. Ladar: At any rate, the objection was that it is still incompetent, irrelevant and immaterial.

Mr. Lund: I join in the same objection.

Trial Examiner Greenberg: The objection is overruled.

The Witness: The answer is no, it was none of my business.

Q. (By Mr. O'Brien): Thank you, sir. Now, before you obtained the signatures to this December

(Testimony of Frank R. Guyon.)

17, 1948, contract, had you been advised by the Board of the dismissal of the representation case?

A. Talking about what case now?

Q. That is Case No. 21-RC-596.

Mr. Lund: We object to the question on the same grounds.

Trial Examiner Greenberg: I admire your persistence.

Mr. O'Brien: I am going to ask right at this point in connection with that to make an offer of proof, and I will request Mr. Lund to supply certain details.

Trial Examiner Greenberg: I sustain the objection.

Mr. O'Brien: The document that he has now, I offer to prove.

Mr. Lund: I will stipulate to the dismissal of the petition on the date of this document, if that is what you are after.

Mr. O'Brien: I mean, sir, that I want to have you read certain language from it.

Mr. Lund: Well, that I won't do. I will stipulate now if [161] you want me to stipulate that on December 3, 1948, the Regional Director dismissed the petition, a copy of which you introduced as General Counsel's Exhibit 5.

Mr. O'Brien: That would be in the case 21-RC-596?

Trial Examiner Greenberg: Do you want to so stipulate?

Mr. O'Brien: I will so stipulate.

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: On December what?

Mr. Lund: December 3, 1948.

Mr. O'Brien: December 3, 1948.

Trial Examiner Greenberg: The Regional Director dismissed the petition in case what?

Mr. O'Brien: 21-RC-596.

Trial Examiner Greenberg: All right, sir.

Mr. O'Brien: General Counsel's Exhibit 5 for identification we will introduce into evidence as the copy of that original petition filed by the Clerks union involving Lee's Department Stores.

Mr. Rissman: If the Examiner please, if we are going to go into portions of Case No. 21-RC-596, I think it is going to become incumbent upon the Amalgamated to introduce everything that occurred there, because if any portion of those proceedings is at all material for anything here, I think the Trial Examiner and the Board should have the benefit of the complete investigation made by the Regional Director and the contentions of the parties and the circumstances surrounding the [162] entire investigation. Otherwise, I submit that none of it is material.

Trial Examiner Greenberg: I have sustained Mr. Lund's objection to the question regarding the R case, and counsel have simply stipulated the fact of the dismissal of the petition.

Mr. Rissman: Of which you could have taken judicial notice without the stipulation.

Mr. O'Brien: That is right. Will you mark this for identification as General Counsel's Exhibit 7?

(Testimony of Frank R. Guyon.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

Mr. O'Brien: General Counsel's Exhibit 7 next in order, which I expect to have rejected on the basis of the Trial Examiner's prior rulings, is a copy of a letter dated December 3, 1948, addressed to Retail Clerks International Association, A. F. of L., 624 Rives Strong Building, 112 West Ninth Street, Los Angeles 15, California, attention of Adele Stillwell, re Lee's Department Store, Case No. 21-RC-596, showing that copies were served upon Lee's Department Store, 6501 Pacific Boulevard, Huntington Park, California. Is that the copy that you have, Mr. Lund?

Mr. Lund: Yes.

Trial Examiner Greenberg: That is a copy from the Regional Director? [163]

Mr. O'Brien: From the Regional Director, and bears the signature of Howard F. LeBaron, is that right, Mr. Lund?

Mr. Lund: That is correct.

Mr. O'Brien: The pertinent portion of this exhibit is paragraph 2.

Mr. Lund: I will object to your reading that. If you are going to offer it as an exhibit, it will be admitted or it won't be admitted. If it is not admitted, it will be in the rejected exhibit file.

Trial Examiner Greenberg: If you want to take

(Testimony of Frank R. Guyon.)

a suggestion, why don't you just make an offer of proof and get your position in the record?

Mr. Lund: I have no objection to the Trial Examiner reading the letter. Make an offer of the exhibit, then if he rejects it make your offer of proof and it will be in the rejected exhibit file.

Mr. O'Brien: There is no question of the authenticity of it. There is only one paragraph I want in here.

Mr. Lund: I will hand it to the Trial Examiner so he can rule on it.

Mr. O'Brien: I offer General Counsel's Exhibit No. 7 in evidence.

Mr. Lund: To which we object on the grounds it is incompetent, irrelevant and immaterial.

Trial Examiner Greenberg: I take it that this letter is [164] being offered to establish the point which I rejected by sustaining Mr. Lund's objection to a question about the representation proceeding, is that correct, Mr. O'Brien?

Mr. O'Brien: In substance, yes, sir.

Trial Examiner Greenberg: Then I will reject General Counsel's Exhibit 7 and direct that it go into the rejected exhibits file.

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was rejected.)

Mr. O'Brien: And I might as well warn you, Mr. Examiner, before we adjourn I will probably reargue that with you. I am sorry.

(Testimony of Frank R. Guyon.)

Mr. Rissman: That is fair warning.

Q. (By Mr. O'Brien): Now, there was one other question I wanted to ask you, Mr. Guyon. That is, in your knowledge of the credit store business in California, which is very long, sir?

A. Oh, within my field of knowledge, limited field of knowledge, 22 years.

Q. And in your expert opinion would it be possible for a credit store, such as your client's, to operate without credit information from all over the country?

Mr. Lund: We object to the question on the ground the witness is not qualified, it is not limited to our client, Lee's; it is general, vague and indefinite, calls for a [165] conclusion.

Mr. Rissman: I would further object on the ground that it has no relation to any of the issues in this proceeding.

Trial Examiner Greenberg: I will overrule the objections.

The Witness: Repeat it, please.

Mr. O'Brien: Will you read the question?

(The question was read.)

The Witness: In my opinion, expert or not, there isn't a single one of them that once out of ten thousand times requires any information from any part of the country except in this area in Southern California here, so far as the stores are concerned that are located here.

Mr. O'Brien: Thank you, sir.

(Testimony of Frank R. Guyon.)

Mr. Gilbert: I have a few brief questions, and they will be supplementary, Mr. Trial Examiner.

Cross-Examination

By Mr. Gilbert:

Q. Mr. Guyon, do you remember attending an informal conference at the offices of the Twenty-First Region of the National Labor Relations Board in connection with the investigation of Case 21-RC-596 on or about November 15, 1948?

Mr. Lund: We object to the question as incompetent, irrelevant and immaterial. Again he is going into the prior R case.

Trial Examiner Greenberg: I would like to ask Mr. Gilbert [166] to state the purpose.

Mr. Gilbert: I will be glad to state the purpose. It is to show this, that at this conference at that date, the witness who now has stated a contrary position with regard to the existence of the Credit Stores Association, stated affirmatively that such an association existed and took a position with respect to bargaining.

Trial Examiner Greenberg: Overruled.

Q. (By Mr. Gilbert): Do you remember the question? Were you at this conference on November 15th? A. Yes, I was.

Q. Do you remember that I was also present at that conference? A. Yes.

Q. Isn't it a fact that you made the statement at that conference that for over 10 years the mem-

(Testimony of Frank R. Guyon.)

bers of the Credit Stores Association had been bargaining on an association-wide basis?

A. I don't recall making the exact statement, but I may have.

Q. Do you recall making any statement similar in substance or effect?

A. I don't remember now about the point, I don't remember, but I remember Mr. Taylor asked me some questions along that line and I answered to the best of my belief.

Q. What do you remember on the subject of association-wide bargaining at that conference? [167]

A. Well, that is too broad a question.

Q. You let the Trial Examiner decide that. I am asking you, you see.

A. I don't know what you mean, I will say.

Q. You say you remember that Mr. Taylor asked you some questions and you gave him some answers. I want your best recollection of what those questions were and what your answers were.

A. He asked me if I had a copy of the contract and I showed it to him and showed him the signatures on the contract, and then you asked me if you could see it, and you remember I said I can't let you have it.

Q. Pardon me just a minute. You are referring now to General Counsel's Exhibit No. 3 in this proceeding, is that right?

A. Whatever it is.

Mr. Lund: That is right.

Mr. Rissman: This document with the wage clause deleted.

(Testimony of Frank R. Guyon.)

The Witness: The contract. Well, it probably was not this same document, because I think we printed them later, but it was very probably a duplicate of this document, yes.

Q. (By Mr. Gilbert): You say at that time you declined to show all of the document to me, is that right?

A. I said I would show you certain specific passages you might ask for, but I felt in respect to the other union that [168] it would not be fair to show the wage clauses.

Q. Do you recall any discussion at that conference of the Credit Stores Association?

A. Yes.

Q. What do you recall?

A. I remember there was a conversation about it.

Q. Do you remember any discussion of the function of the Credit Stores Association?

A. I think so.

Q. Do you remember any reference to the Southern California Merchants Association?

A. No, I don't remember any.

Q. Well, to attempt to refresh your recollection, do you remember your stating to Mr. Taylor, field investigator for the Board, that the Southern California Merchants Association functioned as a credit bureau and trade association, and that the Credit Stores Association's sole function was that of bargaining with respect to contracts?

A. I very probably did. I can't remember it.

(Testimony of Frank R. Guyon.)

Q. At any rate, that was the fact at that time. wasn't it?

A. That was the fact at that time, yes, so far as in my opinion, it was.

Q. Now, on this matter of the length of time that the Association members had dealt with unions generally, do you remember pointing out that in 1941—that previous to 1941, [169] the members of the Association had had agreements jointly with the American Federation of Labor?

A. Will you please explain what you mean by jointly? That term has been abused often in my relations.

Q. Do you remember saying anything about them having had, the members, having contracts with the A. F. of L. prior to 1941?

A. I think I did.

Q. And then do you remember telling Mr. Taylor at that time that the first Amalgamated contract was in 1941?

A. Probably.

Q. And do you remember listing for him the members of the Credit Stores Association who were parties to General Counsel's Exhibit 3?

A. I don't recall that I listed them at that moment or at that conference, but I did get them to him later.

Q. You don't remember naming Brown's, Star Outfitting, Federal, Golden State Department Stores, Coast Department Stores, Lee's Department Stores and one other?

A. I don't recall, but it is very possible I did.

(Testimony of Frank R. Guyon.)

If Mr. Taylor had asked me I certainly would have answered that.

Q. And you also believe it is probable, isn't it, that you told him that they were members of the Credit Stores Association? A. Yes. [170]

Mr. Gilbert I have no further questions.

Trial Examiner Greenberg: Anything further?

Mr. Lund: I have a few questions.

Trial Examiner Greenberg: Do you have any further questions?

Mr. O'Brien: No, I have no further questions.

Mr. Lund: I have some.

Q. (By Mr. Lund): General Counsel's Exhibit 2, which are these bylaws, you made from the original for Mr. Taylor at his request for that document, did you not?

A. I don't know whether that was sent to Mr. Taylor. It was somewhat subsequent to that, if this is it, if this is what I mailed to him.

Q. Did you mail to Mr. Taylor excerpts from the bylaws of the Credit Stores Association?

A. Excerpts, yes.

Q. Did the bylaws of the Credit Stores Association provide for annual meetings of the membership? A. I am quite sure they did.

Q. Have there been since 1941, so far as you know, any annual meetings of the members of the Credit Stores Association, if there were such members?

A. Well, there have not been for a good many years. I don't know when—I don't know just when

(Testimony of Frank R. Guyon.)

they ceased. I don't believe there was one after—I am quite sure there were [171] none after 1941.

Q. The bylaws provided for the annual election of directors? A. Yes.

Q. Have there been, since sometime around 1941, any annual elections of directors?

A. There was never any election since that of directors.

Q. Have there been any elections since 1941, so far as you know?

A. Well, in my opinion the starting directors held on, those that were elected before that.

Q. Has there been anybody who since 1941 or at this time is purporting to act as directors of this association? A. No.

Q. Have there been any officers in this association, so far as you know, since 1941?

A. Same answer, that in my opinion there were not, because there was no election. I don't think anybody considered that there was an actual association after those first Amalgamated contracts were signed in 1941.

Trial Examiner Greenberg: Didn't you consider that there was an association in 1947?

The Witness: In a very loose sense. I had kept on using the same name and the designation and probably still would have continued to do so if it had been offered to me again. Going back to then that is the way I recall the [172] circumstances here, and I think I will still go on using it instead of all this.

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: I don't mean to be offensive, but you are not acting on any other basis in 1947 when you entered into the contract?

The Witness: I did not enter into the contract.

Trial Examiner Greenberg: When you negotiated in the name of this association for respondents.

Mr. Lund: I would have to object now, object to questions based on an incorrect assumption, and I call the attention of the Examiner to the fact that if he examines General Counsel's Exhibit 7 and General Counsel's Exhibit 4, that those are separate contracts with each company.

Trial Examiner Greenberg: Yes, but they also have right on their face a recital that they are entered into by and between the——

Mr. Lund: By and between the signatory parties.

Trial Examiner Greenberg: The Credit Stores Association and the Amalgamated, and Mr. Guyon has previously testified that he negotiated this contract with the representatives of the Amalgamated, is that correct?

The Witness: No, that is not correct: I did not negotiate the contract. I entered into the negotiations.

Trial Examiner Greenberg: Didn't you in your previous testimony testify that you had talked to the representative of [173] the—that you had been approached by the representative of the Amalgamated?

The Witness: That is right.

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: With the demand for higher wage scales?

The Witness: That is right.

Trial Examiner Greenberg: And that you had negotiated with him on that question?

The Witness: That is right.

Trial Examiner Greenberg: And that finally you reached an agreement with them on that?

The Witness: Wait a minute. I testified——

Trial Examiner Greenberg: I just wanted to find out what the contention was.

The Witness: To make it very accurate, my recollection of my testimony is this: That the check-off and increase for the employees were relayed to each individual store, and that a group of them met in my office at the Southern California Merchants Association and discussed prevailing wages. Mr. Glasman of the Amalgamated claimed that the contract rates were too low for a living wage, and they asked me to gather data on the prevailing wages, and they had another meeting and they decided each one individually.

Trial Examiner Greenberg: Who decided?

The Witness: The store owners and all of [174] them.

Trial Examiner Greenberg: Where was the meeting held?

The Witness: They met in my office and discussed the prevailing wages and some appraisals in the monthly rates those prevailing wages indicated,

(Testimony of Frank R. Guyon.)

and they told me, each one of them separately, no one had any control over the other.

Trial Examiner Greenberg: And then subsequently, as you testified, this contract was mimeographed in your office, was it not?

The Witness: Yes, yes.

Trial Examiner Greenberg: And you had this recital put in—I assume you are the one that had that recital put in?

The Witness: That has been put in for years and years.

Trial Examiner Greenberg: And then it was put in this, too?

The Witness: That is right.

Trial Examiner Greenberg: By and between the members signatories of Credit Stores Association?

The Witness: I could have just as well put in there between signatory members of the Southern California Merchants Association, because they are.

Trial Examiner Greenberg: But you didn't?

The Witness: No, I didn't use that designation.

Trial Examiner Greenberg: What I am getting at, at the time these discussions were taking place, didn't you in your own mind assume that you were acting as the representative of [175] the Credit Stores Association in behalf of these people?

The Witness: No, because at that time I knew I wasn't because I had been designated prior to this by each individual member as his attorney on another retainer as their labor relations attorney. Each individual paid me individually.

(Testimony of Frank R. Guyon.)

Trial Examiner Greenberg: But that did not cause you to change the form of the contract and enter into individual contracts. You still retained the same contract with the name of the Association on it?

The Witness: That is right, just had it copied and changed the rates, whatever it was.

Trial Examiner Greenberg: At the time the contract was signed, did any representative of the employers who signed the contract raise any question about the name of the association being in there?

The Witness: Why, no.

Trial Examiner Greenberg: Nobody raised any question about that?

The Witness: No. I will clear that up, if you want me to.

Trial Examiner Greenberg: I would like you to tell us all you know.

The Witness: If someone had asked me the day that this contract was signed, "Is there such a thing as the Credit Stores Association?", I would have said, "Sure." "What is it?" [176] I would have described it. "Do you have any connection with it?" I would have said, "Yes, I am secretary."

But since then I have been reviewing it and those conclusions I might have made at that time are wrong.

Trial Examiner Greenberg: That is all I wanted to find out.

Q. (By Mr. Lund): As I understand the testimony so far, since about 1941, so far as you know,

(Testimony of Frank R. Guyon.)

there have been no officers, directors or employees of the Credit Stores Association, meetings of members or any committees appointed, or acts of any character, is that the substance of it?

A. No elections or appointments of committees, except at times a certain number of stores would act as a committee on their own, the same as our discussion with Mr. Glasman, our association or whoever it was meeting with Mr. Glasman. I don't recall even that in the recent years. I mean by recently three, four, five years.

Q. Directing your attention to General Counsel's Exhibit 7, of the excerpts from the bylaws it spells out in article 8 the powers of the directors, and paragraph 6 of article 5 has some provisions relative to the board of directors shall decide all questions arising in the interpretation of the agreement made with major units of the association or its members or other parties and so on. Since at least 1941 has any group met purporting to act as the Board of directors of [177] the association made any interpretations or decided any question involving the interpretation of the C.I.O. contracts?

A. Never.

Q. Have there been any questions involving a specific interpretation of C.I.O. contracts?

A. Oh, yes.

Trial Examiner Greenberg: Was the wage scale that was agreed upon in that contract dated December 17, 1948, a blanket wage scale to cover all of the signatories?

(Testimony of Frank R. Guyon.)

The Witness: Nobody was committed to sign anything.

Trial Examiner Greenberg: And when they signed, those employers who did sign the contract, did they sign and agree to one standard wage scale for all of them, or were there individual wage scales provided for each individual signatory?

The Witness: Well, in many respects, in most of those, I will say, the wage scales certainly, the wage scales were similar. In other stores they did not apply.

Trial Examiner Greenberg: In other words, you don't deny that some of the employers had a class of employees that some of the other employers did not employ?

The Witness: That is right.

Trial Examiner Greenberg: But was there any wage scale which called for certain scales of wages for given categories of employees which applied to all the signatories?

Mr. Lund: That is in the exhibit. [178]

Trial Examiner Greenberg: I see what you are referring to right there on the first page. That I don't have to ask any questions on.

Mr. Lund: No. It shows that it is uniform.

Q. (By Mr. Lund): Now, the bylaws provide that the secretary take the minutes of meetings down? A. Yes.

Q. Have you kept any minutes of meetings since 1941? A. I never kept any, before or since.

Q. And did the bylaws also provide any secre-

(Testimony of Frank R. Guyon.)

tary was to make an annual report of the conduct of the business of the association? A. Yes.

Q. At least since 1941 have you made any such report?

A. Well, I would have—about the only report I have made is once in a while, not every year, two years, maybe three, sometimes less, I mailed them a financial statement or something like that.

Q. When was the last time you mailed any such financial statement?

A. I don't know, a couple of years, maybe three or four years. I don't know. There was no obligation on me at all. They didn't expect it.

Q. Do you have any funds in a bank account in the name of the Credit Stores Association? [179]

A. At the present time, yes.

Q. About how much?

A. About \$175.00, I guess, something like that.

Q. Those were collected on various dates?

A. There is no current.

Q. There has been no income?

A. I don't know as there ever has been.

Q. My point is, when was the most recent addition to that account?

A. Oh, sometime in 1948.

Q. Nothing since then?

A. I am not sure about that. I haven't any recent addition. As I mentioned yesterday, I was allowed to draw a certain amount from time to time. Most of that stopped in December, 1948, and when I became separate individual attorney for the

(Testimony of Frank R. Guyon.)

different stores, they paid me direct that retainer fee.

Trial Examiner Greenberg: Did that happen before or after the execution of this contract?

The Witness: Before.

Q. (By Mr. Lund): As I understand your testimony on direct, you did meet with a group of employers on or about December 9, 1948, relative to wage scales?

A. We did hold a meeting, but I wouldn't be sure that was the last one or not. [180]

Q. At that time there was a meeting among these employers and the employers were asked to provide the wage scale for the employee's union, is that correct?

A. Well, each one was asked if he would be willing to have this for the wage scale, they asked each other.

Q. And each of them expressed himself?

A. Each of those present expressed themselves, some of them objecting a little on this point or that.

Q. Did Mr. Lee express the opinion of Lee's Department Stores?

A. I couldn't say. I don't remember as to whether he was there. I think he was, yes.

Q. And he did express assent to the new wage scale?

A. Well, if he was there he did, because I know all those present did.

Q. Was Mr. Brown there? A. No.

Q. Was anybody else absent from the meeting,

(Testimony of Frank R. Guyon.)

other than Brown, of those who signed the contract, subsequently signed the contracts?

A. Well, I have an idea one other was absent, but I am not sure.

Q. After this meeting of December 9th, did you contact Mr. Brown and ask him if this scale would be satisfactory to his store? [181] A. Yes.

Q. Mr. Brown negotiated a contract with that wage scale in it, then, did he? A. Yes, sir.

Q. Directing your attention to General Counsel's Exhibit 4, you will notice at the top of the page where the date appears there is a line under 17th. Do you recall that on the original of that document the date was inserted in ink, the 17th?

A. I do recall it.

Q. Was it inserted in ink, the 17th, the same day the contract was signed? A. I think so.

Q. Do you recall whether Farley's ever signed any contract different from the one signed by these other companies? A. Yes.

Q. That was with the C.I.O.?

A. Oh, I misunderstood your question the first time. I thought you meant the Amalgamated. I beg your pardon. Contract different from this one?

Q. Well, did they ever sign?

A. Different from the other members?

Q. Was Farley's at one time a member of the Credit Stores Association? A. Yes. [182]

Q. And did they join in any contract with the other employers who had signed the contract with the C.I.O.?

(Testimony of Frank R. Guyon.)

A. That is right, the Amalgamated contracts.

Q. Did they sign at any time any separate contract with the C.I.O., different in any respect from this so-called Amalgamated contract?

A. Yes, they did.

Q. The negotiations on that were handled through you?

A. Well, just talking to Mr. Glasman for them, I guess. I may have asked Mr. Glasman at their request whether he would make that change in their contract, that difference in their contract.

Q. There was just one thing different in that contract from the one that the others signed?

A. Well, at least one.

Q. At the time that that was signed, the contract was signed between Farley's and the C.I.O. and this Amalgamated Clothing Workers, was Farley's a member of the Credit Stores Association, if there were any members? A. Yes. ..

Q. Directing your attention again to General Counsel's Exhibit 4, in Paragraph 11 thereof, has that paragraph or a similar paragraph been in each of the contracts with the C.I.O. since 1941?

Mr. O'Brien: What article again, sir? [183]

Q. (By Mr. Lund): Article 11.

A. Well, I am sure it was in that. It was in the A. F. of L. contracts that preceded it.

Q. Directing your attention to Article 5, subparagraphs 2 and 3, do you recall whether the union shop provisions therein contained were originally as set up in the contract of the C.I.O. at the request of

(Testimony of Frank R. Guyon.)

the union, the C.I.O., or at the request of the employer? A. Yes.

Q. At the union's request? A. Yes.

Q. Now, as I understand it, it was after this meeting of December 9, 1948, that a group of employers held a meeting with Mr. Glasman and settled on the new wage scale in the contract?

A. Yes.

Mr. Lund: No further questions.

Trial Examiner Greenberg: Anything further with this witness? Thank you, sir.

Mr. O'Brien: Nothing further. Thank you very kindly, Mr. Guyon.

Trial Examiner Greenberg: You have no further questions?

Mr. Ladar: No, I have no further questions.

(Witness excused.) [184]

* * *

ROBERT M. GISSER

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. O'Brien:

Q. Now, picking up where we left off yesterday, Mr. Gisser, for Mr. Lund's benefit, I think you testified briefly that you were in charge of the Federal Division of Speigel?

A. That is right. [185]

* * *

(Testimony of Robert M. Gisser.)

Trial Examiner Greenberg: In other words, of the total volume of annual purchases that you make, approximately 30 per cent are shipped to you or purchased from suppliers and shipped to you directly from outside the State of California? [189]

* * *

The Witness: I think we will be closer if I say 25 per cent. That would be correct.

* * *

Q. And then you said approximately 20 per cent of your total purchases each year are purchased from jobbers or other suppliers in the State of California, but which you know originate from outside of the State of California? A. That is right.

* * *

Q. You said 25—you are right. So that makes up approximately 45 per cent?

A. That is about what it is.

Q. Is the remainder purchased and manufactured inside the State of California?

A. Pretty much that, take off 5 per cent one way or the other, but we don't always delve into the exact locality. [190]

* * *

Redirect Examination

* * *

By Mr. O'Brien:

Q. Well, in any event, the three stores, the one downtown here, the one on South Broadway and the one in Huntington Park are the three stores that

(Testimony of Robert M. Gisser.)

are covered by the contracts with the Amalgamated?

A. Yes, that is right.

Q. And they are the only stores you have covered by the Amalgamated? A. That is right.

Q. And what is the total business of those three stores?

Mr. Ladar: Would you know the purchases of those three stores? [194]

* * *

The Witness: The volume of purchases for the three. Let's see if I have got a little note here to sort of expedite this. A range of two hundred and fifty to about three hundred twenty-five thousand dollars. [195]

* * *

WALTER L. KEEN

a witness called by and on behalf of the General Counsel, having been first duly sworn, testified as follows:

Trial Examiner Greenberg: State your name and address.

The Witness: Walter L. Keen, 510 Warner Avenue.

Direct Examination

By Mr. O'Brien:

Q. Your business address, sir?

A. 6501 Pacific Boulevard, Huntington Park.

Q. You are employed by whom?

A. Lee's Department Store.

(Testimony of Walter L. Keen.)

Q. In what capacity?

A. General Manager. [246]

Q. How long have you held that position?

A. Approximately five years.

Q. It is called Lee's Department. What departments do you have, sir?

Mr. Lund: Just a moment. I am going to object to the question and any succeeding questions along the same line. Counsel indicated that he wanted to interrogate this, Mr. Keen, in respect to commerce, which we haven't admitted.

Trial Examiner Greenberg: Objection overruled.

Mr. O'Brien: Will you read the question, Mr. Reporter?

(The question was read.)

The Witness: Men's, women's and children's apparel, jewelry, houseware, furniture and appliances and shoes.

Q. Are those all separate departments?

A. I don't understand you.

Q. Are they all separate departments?

A. I don't understand what you mean by "separate."

Q. You have separate departments in your store for each category of merchandise?

A. You mean physically?

Q. Yes.

A. Well, the merchandise is separated.

Q. That's right. And you have a separate manager for each department? A. No. [247]

(Testimony of Walter L. Keen.)

Q. About how many employees do you have in the store?

A. I would say approximately 60 full-time employees.

Q. Sixteen? A. Sixty.

Q. Sixty full-time employees. Approximately what percentage of your business is done on credit, sir?

Mr. Lund: To which we object on the ground it is not in the pleadings in this case. There is nothing in the allegations of the complaint relative to that.

Trial Examiner Greenberg: Overruled.

The Witness: By credit, you mean installment credit?

Q. (By Mr. O'Brien): That's right, sir.

A. I would say approximately 70 to 75 per cent.

Q. Thank you, sir. I show you General Counsel's Exhibit 5 for identification, and ask you if you have seen that before?

Mr. Lund: I object to the question on the ground it is incompetent, irrelevant and immaterial. It has been so ruled by the Trial Examiner.

Trial Examiner Greenberg: That is the one that was rejected?

Mr. Lund: That's right.

Trial Examiner Greenberg: Sustained.

Mr. O'Brien: You mean I can't inquire whether he saw it or not?

Mr. Lund: It isn't material if he did see it. [248]

Trial Examiner Greenberg: Sustained.

(Testimony of Walter L. Keen.)

Q. (By Mr. O'Brien): After you saw this petition, sir, what action did you take?

Mr. Lund: I object to the question on the ground it assumes a fact not in evidence and immaterial.

Trial Examiner Greenberg: Sustained.

I should like to inquire at this point in order to avoid any possible injustice to you, if your inquiry is with relation to this subject matter or is it directed at some other point other than the one which you explained previously when I rejected this exhibit?

Mr. O'Brien: What I am doing, sir, is using this document to call the witness' attention to a particular time. I mean no disrespect.

Trial Examiner Greenberg: I am not offended in the slightest.

I wanted to ask whether you were pursuing that line of inquiry or directing it to some point other than the one you have already called to my attention.

Mr. O'Brien: Perhaps I can do it this way: I would offer to prove through this witness that when he received notice of the filing of this petition from the Labor Board he did inquire of his Department heads whether or not the A. F. of L. had a majority in his store.

Trial Examiner Greenberg: How is that material to the [249] issues here?

Mr. O'Brien: It is material in that—and I am not going to put the answer into his mouth—he may have or may not have had a majority at the

(Testimony of Walter L. Keen.)

time Lee's Department Store signed the contract which is already in evidence.

Trial Examiner Greenberg: I get your point. I will allow you to pursue that line of inquiry.

You don't have to refer to that document necessarily. You can ask whether there came a time when he made such an inquiry of his Department heads.

Q. (By Mr. O'Brien): Mr. Keen, you have heard our discussion. Did you receive a copy of the petition from the Labor Board?

Mr. Lund: I am going to object to it on the grounds that it is incompetent, irrelevant and immaterial.

Trial Examiner Greenberg: I will overrule the objection.

The Witness: Yes, we did.

Mr. Lund: Wait a minute. Read the question back to the witness.

(The question was read.)

The Witness: I don't know what the petition is.

Mr. Lund: He didn't receive it. He never saw it until this hearing.

Q. (By Mr. O'Brien): Did you receive notice of the filing of a petition? A. Yes, sir. [250]

Mr. Lund: Let that be a lesson to you, Mr. Witness, to listen to the questions and answer accurately.

Q. (By Mr. O'Brien): What action did you take?

Mr. Lund: We will object to the question on the grounds it is incompetent, irrelevant and immaterial.

(Testimony of Walter L. Keen.)

Trial Examiner Greenberg: I assume that Mr. O'Brien is still pursuing the line of inquiry which he indicated, and I will overrule the objection.

Mr. O'Brien: Would you read the question?

(The question was read.)

The Witness: I inquired of my Department heads as to whether or not to their knowledge there were any members of the American Federation of Labor among our employees.

Q. (By Mr. O'Brien): And what replies did you receive?

Mr. Lund: I object to the question on the ground it is incompetent, irrelevant and immaterial.

Trial Examiner Greenberg: Overruled.

The Witness: It was stated by some of them that they had heard some discussions on the part of a few of the women employees regarding the A. F. of L. The number of employees whose names were mentioned in any way in that respect, as either having commented or in any way related, was either five or six of the women employees.

Q. Again calling your attention to the first of December of 1948, which is approximately this time, at that time did you [251] have a contract with the Amalgamated?

A. I don't believe it was December the first, 1948; I believe it was several months before that.

Mr. Lund: It is all immaterial. I might offer the fact in order to get the accurate date of the Regional Director's letter, if I have got it.

(Testimony of Walter L. Keen.)

We will stipulate, if you want to, that the Regional Director's letter to Lee's was dated October 29, 1948. We will stipulate to that fact, but object to its admission as being incompetent, irrelevant and immaterial and not within the issues of the pleadings, and barred by the provisions of the Statute of Limitations of the Act.

Mr. O'Brien: Thank you very kindly.

Trial Examiner Greenberg: Will you accept that statement?

Mr. O'Brien: I will accept that statement as accurate. It is accurate.

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 3 for identification, and as of October of 1948, after you received this letter from the Regional Director, was that the contract which you had in effect with the Amalgamated?

A. Yes, I believe it was.

Q. During that period had you been deducting dues from your employees?

Mr. Lund: Wait a minute. I object to the question on the [252] ground it is incompetent, irrelevant and immaterial, and renew at this time my motion for the Trial Examiner to strike paragraph nine of the complaint, on the basis of the Board's decision I cited this morning.

Trial Examiner Greenberg: Same ruling. The objection is overruled.

Mr. Lund: This morning you reserved your ruling, as I recall. You were going to examine the case.

Trial Examiner Greenberg: You are now direct-

(Testimony of Walter L. Keen.)

ing the objection to any material about dues directions?

Mr. Lund: That's right.

Trial Examiner Greenberg: I will reserve the ruling on your objection and will allow the witness at this time to answer, subject to a possible ruling by the Trial Examiner that the material should be stricken from the record. In other words. I am assuming you have a standing motion to strike any material pertaining to this subject.

Mr. Lund: It won't be necessary for me to renew my objection each time.

Trial Examiner Greenberg: No. It will save a lot of time if we have that understanding.

Mr. O'Brien: Would you like to have the question read?

The Witness: Yes, will you read it?

(The question was read.)

The Witness: Yes. [253]

Q. (By Mr. O'Brien): By that you mean the period from October through December, 1948?

Mr. Lund: I object to that question on the additional ground that it is clearly outside the statutory period.

Mr. Gilbert: I submit that it is background information that is admissible as evidence.

Trial Examiner Greenberg: I will overrule the objection.

Q. (By Mr. O'Brien): Now, I show you General Counsel's Exhibit No. 7, presently rejected.

(Testimony of Walter L. Keen.)

Trial Examiner Greenberg: You didn't get an answer.

Mr. Gilbert: I don't think we have an answer to that last question.

Mr. O'Brien: Would you read the question, Mr. Reporter?

(The question was read.)

A. Yes.

Q. By Mr. O'Brien): Now, disregarding this card on the outside I ask you if you received a copy of this letter?

Mr. Lund: Wait a minute. I object to the question on the grounds it is incompetent, irrelevant and immaterial. That again goes back to the R petition. You have excluded that exhibit.

Mr. Rissman: That is the same rejected exhibit.

Mr. O'Brien: That is the same rejected exhibit dated December 3rd, 1948.

Trial Examiner Greenberg: I will now ask you again [254] what is the purpose of this line of inquiry?

Mr. Lund: As a matter of fact, there is a stipulation in the record that that letter was mailed and received on or about that time.

Mr. O'Brien: That's right.

Trial Examiner Greenberg: Do you withdraw your objection?

Mr. Lund: It is already covered through the stipulation. No testimony by this witness could be received to contradict that stipulation.

(Testimony of Walter L. Keen.)

Mr. O'Brien: I will take that then and withdraw my question.

Q. (By Mr. O'Brien): And it was on or about the 17th day of December that you signed this contract which is General Counsel's Exhibit 4, is that right, sir? A. Yes.

Q. This is it, this one here (indicating)?

A. Yes.

Q. Will you tell us what you remember about Jackson's discharge? Is there anything you remember about Mr. Jackson?

A. Which do you want me to tell you about, anything I remember about Mr. Jackson, or anything about his discharge?

Q. I am sorry. Do you know when he was hired?

A. November, 1947.

Q. In November of 1947 was he hired by [255] you? A. No.

Q. By who, sir?

A. By the Department head of the men's department.

Q. His name was what, sir? A. Mr. Fink.

Q. What was Mr. Jackson's job?

A. Furnishings salesman.

Q. When was he discharged?

A. May, 1949.

Q. By whom? A. Mr. Henry.

Q. Mr. Henry's job was what, sir?

A. He is the Manager of our collection department.

(Testimony of Walter L. Keen.)

Q. What was Mr. Jackson's job during that period, from November of 1947 to May of 1949?

A. For a portion of that time he continued to be a salesman.

Q. Salesman in the men's department?

A. Men's department.

Q. That would be suits and——

A. Men's furnishings.

Q. Neckties and items like that?

A. Yes. He was not a suit salesman. Having proved unfitted for that, he was moved to the collection department, I believe, in January of 1948.

Q. In January of 1948 he was moved to [256] the——

A. Collection department, and he remained in that department until the time of his discharge.

Q. What was his job in the collection department?

A. Regular credit and collection work having to do with the checking of accounts, and some certain duties having to do with the taking of credit applications.

Q. Would that be strictly a clerical desk job?

A. No, that was not a clerical desk job; it was work which entailed direct contact with customers.

Q. Would you call that leg work?

A. No, it wasn't leg work; it was office work and phone work. He never was outside the store in the course of his work. That work was all conducted on the premises.

Q. What was the reason for his discharge?

(Testimony of Walter L. Keen.)

A. He was discharged as a part of an overall cutting down program which was put into effect at that time because of business conditions.

Q. Has his job in the collection department ever been filled? A. No.

Q. I assume your staff of permanent employees has remained the same over the last four years, about 60 permanent employees?

A. Approximately.

Q. Of course, during Christmas and rush seasons, why, you have to put on a large number of help? A. Of extra help. [257]

Q. In your inquiries in the fall of 1948 had anyone mentioned Mr. Jackson's name?

A. No one mentioned Mr. Jackson.

Q. In your inquiries during the fall of 1948, had any of your supervisors mentioned Mr. Jackson's name? A. No.

Trial Examiner Greenberg: Do you mean did they mentioned him as being interested in the A. F. of L., is that what you mean?

Q. (By Mr. O'Brien): The testimony so far is that Mr. Keen had acquired when this A. F. of L. petition was filed and certain names were mentioned. I haven't inquired as to who they were, but I just want to know specifically whether Mr. Jackson's name was mentioned?

A. His name was not mentioned.

Q. Do you know whether or not Mr. Jackson's dues were automatically checked off to the Amalgamated?

(Testimony of Walter L. Keen.)

Mr. Lund: Wait a minute. Counsel ought to remove the word "automatic." It calls for a conclusion.

Q. (By Mr. O'Brien): Do you know if Mr. Jackson's dues were checked off to the Amalgamated? A. I don't know specifically.

Q. But your intention was to comply with the contract and check off everyone's dues, is that right?

Mr. Lund: Wait a minute. I object to the question on [258] the grounds that the only contract in evidence herein does not have any reference to check-off. It assumes a fact not in evidence.

Q. (By Mr. O'Brien): I think your testimony, sir, was that dues had been deducted for employees?

A. Yes.

Q. In the Amalgamated? A. Yes.

Q. And that meant all the employees, did it not, sir? A. No.

Q. Just employees who were members of the Amalgamated?

A. I am not sure that it included all of those either.

Trial Examiner Greenberg: You were in general charge of the management of the store, were you not?

The Witness: Yes.

Q. Did you have anything to do with checking off the dues? Would it be under your general direction?

The Witness: My general direction, yes.

(Testimony of Walter L. Keen.)

Trial Examiner Greenberg: What were your instructions in regard to which employees would have their dues deducted and which wouldn't?

The Witness: I gave none, because every arrangement there was already in existence at the time I took over as the Manager, and I never had occasion to give instructions. [259]

Trial Examiner Greenberg: Do you know what that arrangement was?

Mr. Lund: Wait a minute. Apparently the witness has indicated that he has no knowledge about it other than through hearsay.

Trial Examiner Greenberg: He said there was an arrangement in effect at the time he assumed the management of the store, and that he didn't disturb that arrangement, is that correct?

The Witness: Yes.

Trial Examiner Greenberg: I am asking do you know what that arrangement was?

The Witness: I knew through perusing employee's records, their pay roll records, that I would see notations on there which meant Union dues deductions. As to the extent and unanimity of such, of course, I didn't inquire.

Mr. Lund: I have got something that might assist Mr. O'Brien and shorten this inquiry.

Trial Examiner Greenberg: Off the record.

(Discussion outside the record.)

Trial Examiner Greenberg: On the record.

Q. (By Mr. O'Brien): Did you make any check

(Testimony of Walter L. Keen.)

to find out whether or not Mr. Jackson had dues checked off to the Amalgamated?

A. No. [260]

Q. You didn't? A. No.

Q. At least prior to his discharge you don't know whether he was a member of the Amalgamated or not? A. I don't know specifically.

Q. Of your own personal knowledge you don't know whether he was a member of the Clerks?

A. No.

Q. You don't know whether he engaged in any activity on behalf of the Clerks?

A. No, I don't.

Mr. O'Brien: That is all.

Trial Examiner Greenberg: Aside from any personal knowledge that you might have with respect to those facts, did anyone ever give you any information to the effect that Mr. Jackson was a member of or active on behalf of the Retail Clerks? [261]

The Witness: During his employment?

Trial Examiner Greenberg: Yes, prior to his discharge.

The Witness: Not prior to his discharge.

Q. (By Mr. Gilbert): When did you say you became general manager of Lee's?

A. 1944, I believe it was, in the fall of 1944.

Q. During the period since you have been manager there, to your knowledge has there ever been a National Labor Relations Board certification of the Amalgamated Clothing Workers as representative for Lee's employees?

(Testimony of Walter L. Keen.)

Mr. Rissman: I object.

Mr. O'Brien: I think I will join in the objection. It is admitted.

Mr. Gilbert: It is admitted as to Federal; it is not admitted——

Mr. Lund: I object to the question and call your Honor's attention to the fact that over our objection inquiry was permitted by Mr. O'Brien concerning hearsay, and then there was testimony from other witnesses concerning Federal. For all the other reasons plus accumulative evidence we object to the question.

Mr. Gilbert: There is no testimony on this point.

Trial Examiner Greenberg: I will overrule the objection.

Do you recall the question?

Q. (By Mr. Gilbert): NLRB certification of the Amalgamated as [262] representative of Lee's employees.

A. Not to my knowledge.

Q. To your knowledge, was there ever an election conducted among your employees by any agency to determine whether or not a majority wanted to be represented by the Amalgamated Clothing Workers?

Mr. Lund: I want to make an objection to the preceding question. He asked him since the period he was general manager—is that what you mean?

Mr. Gilbert: It related to the same period. All of these questions relate to the same period.

(Testimony of Walter L. Keen.)

Mr. Rissman: May I have a continuing objection?

Mr. Lund: And may I also have a continuing objection?

Trial Examiner Greenberg: In admitting the testimony I am doing so because I think there might be possible relevancy to the issue of assistance. I am not thereby passing on what weight is to be given to the testimony, and the objections which are now pending are overruled.

The Witness: I don't know of any election.

Q. (By Mr. Gilbert): You don't know of any check of union applications against pay roll records or other similar card check having taken place during that period?

A. By the employees' cards, you mean?

Q. Yes. A. No. [263]

Mr. Gilbert: No further questions.

Trial Examiner Greenberg: Anything further of this witness?

I guess that is all, Mr. Keen. Thank you, Mr. Keen.

Mr. O'Brien: Thank you very kindly, sir. [264]

* * *

Mr. Lund: I take it your sales by your store are all made to residents in the Southern California area? You don't ship sales outside of California?

The Witness: Yes. [288]

* * *

Trial Examiner Greenberg: I assume, then, that that closes the case, except that Mr. Lund has a motion.

Mr. Lund: Everybody has indicated on the record that they have rested their case. My motion is to strike from the record all testimony and exhibits with reference to the check-off, at least so far as they pertain to Respondent Lee's.

You will recall when the evidence was admitted along that line I objected on the basis that the whole allegation of the complaint was immaterial. You were reserving judgment on the motion to strike Paragraph 9 of the Complaint and suggested that a motion to strike all the testimony concerning check-off would be appropriate at a later time, and I have a standing motion to that line of testimony. Inasmuch as this will probably be the last time to make my motion I make it now.

Trial Examiner Greenberg: I will reserve ruling on that motion and rule on it in my intermediate report.

Mr. Ladar: I make that same motion as to Federal. [295]

Trial Examiner Greenberg: Same ruling.

Mr. Rissman: I make it as to the entire record.

Trial Examiner Greenberg: To strike the entire record?

Mr. Rissman: To strike the testimony with respect to check-off as to any party.

Trial Examiner Greenberg: Same ruling.

Mr. Lund: I am not going to make it, but you know we feel that there is no commerce here and

the whole thing should be dismissed, but that will be determined by the ruling in your intermediate report.

Trial Examiner Greenberg: I will reserve ruling on Mr. Lund's motion to dismiss the complaint in its entirety as to Respondent Lee's.

Mr. Ladar: May the record show that on behalf of Federal I make a motion to dismiss the complaint in its entirety as to Respondent Federal.

Trial Examiner Greenberg: Same ruling.

Mr. Lund: I will argue in my brief, so I think I might make a motion now anticipating that you will reserve ruling until your intermediate report and after you have had a chance to study the briefs of the parties, and that is one of the motions that I made at the outset, which I think has considerable merit; the fourth motion that we made to strike on the basis of failure to comply with the six-month limitation period, all of Paragraphs 7, 8, 9, 12 [296] and 14 and each of them and the reference in Paragraph 19 to subsection (2) of Section 8 (a) of the Act.

We move to strike all those allegations or the alternative.

Trial Examiner Greenberg: You are renewing your motion?

Mr. Lund: That is right.

Trial Examiner Greenberg: I will reserve the motion.

Mr. Rissman: I want to move now to dismiss the entire complaint for the following reasons: First, that to proceed on this complaint even

though one of the respondents may technically be in commerce, as the Board has at times interpreted that phrase, it would not effectuate the policies of the Act to assert jurisdiction over any of these respondents.

Secondly, I want to point out that the position of the Amalgamated is one of taking no position on this subject. It is the theory of the General Counsel, as far as I have been able to discern any theory from the proof presented in this hearing, that the Board should assert jurisdiction over Respondent Lee's and inferentially over the stores other than Federal by virtue of the fact that Federal has one store in a state other than California.

Inasmuch as that is a theory predicated upon bargaining unit, the Amalgamated takes no position with respect to it. Inasmuch as the theory of either of the respondents may be predicated upon the theory of a single bargaining unit or [297] a bargaining union limited to any one employer in this group, we take no position there.

The reason we take no position on bargaining unit is because we think that is not a matter which is in issue in this hearing and if it is necessary to take a position on unit, we will do so in an appropriate proceeding.

Trial Examiner Greenberg: I didn't understand what you said at the beginning of your remarks. Were you making a motion for dismissal on jurisdictional grounds, of limiting it solely to the theory that it would not effectuate the policies of the Act to assert jurisdiction over these respondents?

Mr. Rissman: I am practical enough to know, and assume lawyer enough to realize, that the Board could, if it wanted to, assert jurisdiction over any retail operation. Keeping in mind, however, the Board's policy, not Mr. Denham's, but the Board's policy, in asserting jurisdiction over retail operations only where the policies of the Act would be effectuated.

I make a motion to dismiss, keeping in mind a recent decision of the Board in a case coming out of this region in the matter of Esquire, Incorporated—I don't have the citation—it was decided about a month ago—in which the Board found that, although the operations of the employer were not unrelated to commerce, the petition in that [298] case was dismissed because the Board felt it would not effectuate the policies of the Act to assert jurisdiction.

Trial Examiner Greenberg: I reserve the motion. [299]

* * *

Trial Examiner Greenberg: I would like to address especially to Mr. O'Brien the request that in his memorandum——

Mr. Ladar: Do you want this on the record?

Trial Examiner Greenberg: Yes.

——he state exactly what theory he proceeds upon in support of his assertion that the Board should assert jurisdiction over the respondents in this case, first, with respect to Federal. There isn't as much question in my mind, frankly, with regard to the respondent Federal as there is with regard to the

operations of respondent Lee's. At any rate, I would like some authority to show what the Board's policy has been with respect to enterprises.

With respect to Federal and with respect to Lee's, I would like these two questions answered: One, standing alone, is it the sort of enterprise over which the Board in its discretion customarily asserts jurisdiction? You have to take the position, being a representative of the General Counsel, that the Board has no power to dismiss the Complaint solely on policy grounds, and if it has technical jurisdiction, it must assert it once a Complaint is issued.

I am not assuming to dictate to you whether you want to reargue that question to me or not. I don't request that you do so. I think I am pretty well acquainted with the respective points of view with respect to that. [301]

Assuming for the sake of argument that the Board will continue to exercise its discretion in that matter, one does it have jurisdiction of the Lee's Department Store? What is the precedent? Has it customarily asserted it? You can assert any arguments you wish as to whether it should assert it in this case.

Standing alone, if you think it is the kind of case that the Board wouldn't customarily assert jurisdiction, why should it do so in this case? Just because there has been a consolidation of the hearing with another respondent? Those are quite obviously the matters with respect to jurisdiction which I think will need clarification. [302]

Now, with respect to the issue raised by Mr. Lund, I at first denied his motion to strike from the record testimony with respect to the check-off dues and then later reserved ruling, and I certainly don't want to indicate by that that my mind is closed. I think he has raised a substantial legal issue there and I would like to hear some discussion with respect to what extent, if any, the deduction of union dues from an employee's pay without the employer having received an individual authorization to do so constitutes an unfair labor practice, and if it does constitute an unfair labor practice at all, under what circumstances—and I believe Mr. Lund has cited to us the very recent case of *Salant and Salant*—the Board makes it quite clear that standing alone such conduct on the part of an employer does not constitute an unfair labor practice. There is nothing in the Act which makes it an unfair labor practice for an employer to make such check-offs even though not authorized by the [303] individual employee.

Apparently by your insistence in having that evidence admitted and given weight, you insist that under the circumstances of this case that the check-offs to the extent that they took place do constitute unfair labor practices. I would like to know why. What is your theory on that?

Now, turning to respondents' counsel, I don't want to be disingenuous about it. I have certain preliminary thoughts on the matter.

Mr. Lund, I just want to call your attention to my initial reaction to the *Salant & Salant* case. That

while the Board says that standing alone the unauthorized deductions do not constitute an unfair labor practice, if the deductions are on behalf of the union which has been illegally assisted by the employer, then it seems to me, at least initially—I haven't had a chance to give too extensive consideration to the meaning of that case—it seems to me taken in conjunction with the other acts of illegal assistance, such unauthorized deductions would constitute an unfair labor practice and therefore be a violation of Section 8 (a) (1) and 8 (2) of the Act. I think you have to grapple with that issue in your briefs, and so does Mr. Ladar.

Mr. Ladar: I understand.

Trial Examiner Greenberg: The question of the discharges [304] in this case it seems to me are comparatively simple. I think with respect to one of them there is quite a sharp conflict of fact. I will simply have to resolve that the best I can.

I can't think of any specific questions at this time that will trouble me. You will argue out the factual issue.

Let me ask this right here: There isn't any dispute as to the fact that there was a contract entered into on December 17, 1948, between the two respondents and the Amalgamated, which provided for a union shop, and there isn't any dispute about that clause, that the union security clause in the contract was not preceded by any election such as called for by the Amended Act?

Mr. Ladar: It is admitted by the Act.

Trial Examiner Greenberg: There was no au-

thorization of the union security clause secured as a result of a required election. That being so, it seems to me that the Resnick case pretty well settles the question so far as the Board authority is concerned.

Mr. Lund: If there is jurisdiction.

Trial Examiner Greenberg: That's right, if there is jurisdiction, assuming that, of course. If the contract is by Board precedent illegal, that it constitutes a violation of Section 8 (a) (1) of the Act, and it constitutes illegal assistance in violation of 8 (a) (2) of the Act, it would [305] follow that the remedy would be, according to the Resnick case, that this contract be set aside as illegal.

Mr. Lund: Is there any point in arguing before the Trial Examiner that the remedy is the Resnick case—the whole contract is illegal and would not effectuate the policies of the Act in view of the Board's decisions?

Trial Examiner Greenberg: While Trial Examiners are independent to the extent that they make fact findings and they may resolve questions of law according to their own views—like a Judge, who is also independent—a Trial Examiner is bound by precedence, and Board decisions are precedents for Trial Examiners.

As a matter of fact, I can tell you on the record that I was the Trial Examiner in the Resnick case, and to the extent that the Board applied a broader remedy, I was commended and I was overruled in that case. I certainly consider the Board's decision in the Resnick case binding upon me.

Mr. Rissman: Except that it probably should be raised before the Trial Examiner.

Trial Examiner Greenberg: To preserve your rights before the Board. I think the Board might be open to conviction on the subject. They have been known to change their minds.

Mr. Rissman: The Board has changed since then, too.

Trial Examiner Greenberg: I think we have covered about [306] everything that comes to my mind at present. There is one further question about the Statute of Limitations which has been raised. I think I made a statement on the record that I view the section of the Act which contains this limitation as a Statute of Limitations and not as a rule of evidence. While I can't make findings of unfair labor practices with respect to—technically no complaint can issue with respect to the commission of unfair labor practices more than six months preceding the serving of charges, yet events happening in the preceding period can be considered, it seems to me, in order to understand the sequence of events and to give significance to the events which did happen in the six months period.

Mr. Lund: How can you hold a union provision illegal though executed more than six months prior to the charge?

Trial Examiner Greenberg: It wouldn't necessarily have to hold that the execution of the contract was illegal if it took place prior to the six months, but you would have the right to consider it and to find subsequent enforcement of that, if it is an

illegal contract, constituted unfair labor practices.
I am indicating my thinking as I sit here.

Mr. O'Brien: I don't think it is in point at all.

Mr. Lund: I do, the Goddal Case. [307]

* * *

Received March 30, 1950.

In the United States Court of Appeals
for the Ninth Circuit

No.

LEO KATZ, MINDA KATZ, OTTO KATZ, LEE-
MOND KATZ, PHIL KATES, DOROTHY
KATES, ELY ELIAS, BERTHA ELIAS,
JULIAN ELIAS and WALTER L. KEEN,
d/b/a LEE'S DEPARTMENT STORE,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended, (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a con-

solidated proceeding had before said Board, entitled, "In the Matter of Federal Stores Division of Spiegel, Inc., and Retail Clerks International Association, A. F. of L., and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, Party to the Contract," and "In the Matter of Leo Katz, Minda Katz, Otto Katz, Leomond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store and Retail Clerks International Association, A. F. of L. and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, Party to the Contract," the same being known as Cases Nos. 21-CA-420 and 21-CA-481, respectively, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Isadore Greenberg Trial Examiner for the National Labor Relations Board, dated March 7, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Greenberg on March 7 and 8, 1950, together with all exhibits introduced in evidence, also all rejected exhibits.

(3) Stipulations of the parties for correction of the transcript of record, dated April 28, 1950. (Ap-

proved in the Board's Decision and Order of October 4, 1950, page 2, footnote 1.)

(4) Letter from Federal Stores Division of Spiegel, Inc., (Respondent before the Board in Case No. 21-CA-420, hereinafter referred to as Federal Stores), dated March 17, 1950, requesting extension of time to file brief with the Trial Examiner.

(5) Copy of Chief Trial Examiner's telegram, dated March 20, 1950, granting all parties extension of time to file briefs.

(6) Petitioners' (Respondents before the Board in Case No. 21-CA-481) telegram, dated April 7, 1950, requesting extension of time to file brief with the Trial Examiner.

(7) Copy of Chief Trial Examiner's telegram, dated April 7, 1950, granting all parties further extension of time to file briefs.

(8) Copy of Trial Examiner Greenberg's Intermediate Report, dated May 12, 1950, (annexed to Item 16 hereof), order transferring case to the Board, dated May 12, 1950, together with affidavit of service and United States Post Office return receipts thereof.

(9) Petitioners' telegram, dated May 29, 1950, requesting extension of time for filing exceptions and brief.

(10) Letter from Federal Stores Division of Spiegel, Inc., dated May 31, 1950, requesting extension of time for filing exceptions and brief.

(11) Copy of telegram, dated May 31, 1950, granting all parties extension of time for filing exceptions and brief.

(12) Letter from Federal Stores, dated June 3, 1950, requesting further extension of time to file exceptions.

(13) Copy of telegram, dated June 5, 1950, granting all parties further extension of time to file exceptions.

(14) Copy of Petitioners' exceptions to the proceedings and the Intermediate Report, received June 19, 1950.

(15) Copy of exceptions of Federal Stores to the Intermediate Report, received June 19, 1950.

(16) Copy of Decision and Order issued by the National Labor Relations Board on October 4, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 9th day of March, 1951.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National Labor Relations
Board.

[Endorsed]: No. 12827. United States Court of Appeals for the Ninth Circuit. Leo Katz, Minda Katz, Otto Katz, Leemond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, doing Business as Lee's Department Store, Petitioners, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Filed March 13, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED ON
RE APPEAL

Petitioners, Leo Katz, Minda Katz, Otto Katz, Leomond Katz, Phil Kates, Dorothy Kates, Ely Elias, Bertha Elias, Julian Elias and Walter L. Keen, d/b/a Lee's Department Store, propose on their appeal to the Circuit Court for the Ninth Circuit to rely on the following points as error:

(1) The National Labor Relations Board (hereinafter designated as the "Board") erred in refusing to grant the motion of Petitioners (Co-Respondents in the Board proceedings) to sever and separate the case involving these Petitioners from the case involving the other Co-Respondents below, Federal Stores Division of Spiegel. Inc.

(2) The Board erred in refusing to dismiss the entire proceedings for failure of the General Counsel to join an indispensable party in the proceedings below, as a party respondent, to wit, Amalgamated Clothing Workers of America, Local Union No. 81, CIO.

(3) The Board erred in not granting Petitioners' motions to strike paragraphs 7, 8, 9, 12 and 14 of the Complaint and the reference in paragraph 19 of the Complaint to Section 8 (a) (2) of the Act, and all evidence received thereunder, or in the alternative to dismiss the proceeding with reference to such allegations.

(4) The Board erred in determining that Petitioners were engaged in commerce within the meaning of the Labor Management Relations Act, in determining that it had jurisdiction over Petitioners, and in exercising jurisdiction over Petitioners.

(5) The Board erred in not granting Petitioners' motion to strike all the testimony relative to the check-off of union dues, and in not granting the other motions of Petitioners during the proceedings below.

(6) The Board's determination that Petitioners violated Section 8 (a) (1), (2), and (3), or any of said sections, of the Labor Management Relations Act by "keeping in existence" and "enforcing" the alleged union-security provision of the contract of December 17, 1948, between Petitioners and the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, is not supported by the evidence and is contrary to law.

(7) The Board erred in determining that the activities of Petitioners have a close and substantial relation to interstate commerce and tend to lead to labor disputes burdening or obstructing interstate commerce.

(8) The Board's entire order relating to Petitioners (except the portion thereof dismissing the Complaint insofar as it alleges Petitioners "committed unfair labor practices by checking off Amalgamated dues from the pay of their employees"),

is not supported by the evidence, is illegal, and is contrary to the law.

LATHAM & WATKINS,

By /s/ R. W. LUND,

Attorneys for Petitioners.

Dated May 29, 1951.

[Endorsed]: Filed May 31, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To: The Clerk of Court, United States District
Court of Appeals for the Ninth Circuit:

Petitioners in the above-entitled action designate the following portions of the record and pleadings in the consolidated proceedings before the National Labor Relations Board, Case No. 21-CA-420 and Case No. 21-CA-481, which proceedings are more particularly described in the Petition for Review herein filed, as material to the consideration of the review herein:

(1) The following portions of the stenographic transcript of the testimony taken before Trial Examiner Isadore Greenberg on March 7 and 8, 1950: Title Page; Pages 1-70; Pages 139-184; Page 246, beginning at line 13, to Page 264, line 6; Page 288, beginning at line 5, to line 8 thereof; Page 295,

beginning at line 8, to Page 299, line 3; Page 301 to Page 302, line 12; Page 303, beginning at line 9, to Page 307, line 23.

(Note to Clerk: Unless otherwise designated, above transcript references to pages and lines include the last page and/or line named, i.e., the references are inclusive.)

(2) The following exhibits introduced in evidence: General Counsel Exhibits 1-A, 1-D, 1-G, 1-J, 1-K, 1-M, 1-N, 1-P, 1-R, 1-U, 2, 2-B, 3, 4, and 6.

(3) Trial Examiner Greenberg's Intermediate Report dated May 12, 1950.

(4) Order transferring case to the National Labor Relations Board, dated May 12, 1950.

(5) Petitioners' Exceptions to the Proceedings and the Intermediate Report, dated June 15, 1950.

(6) Decision and Order issued by the National Labor Relations Board on October 4, 1950.

(Note to Clerk: Do not include here a copy of the Intermediate Report annexed to the Decision and Order, for the Intermediate Report is already designated in Item (3) above.)

(7) Petition for Review of the Order of the National Labor Relations Board, subscribed and sworn to on January 25, 1951, and signed by Richard W. Lund.

(8) Notice of Filing of Petition for Review of the Order of the National Labor Relations Board,

dated January 24, 1950, and signed by Richard W. Lund.

(9) Affidavit of Service by Mail of the Notice of Filing of Petitioner for Review, executed by Wanneata Maddux, and subscribed and sworn to on January 24, 1950.

(10) Answer of the National Labor Relations Board to the Petition to Review Order and Request for Enforcement of said Order, dated March 9, 1951.

(11) Certificate of National Labor Relations Board certifying that certain documents annexed thereto constitute a full transcript of the proceedings before the Board, dated March 9, 1951.

(Note to Clerk: Do not include copies of the documents annexed to Item (11).)

(12) Designation of Contents of record on appeal, including caption, and service thereon.

(13) Petitioners' Statement of Points Relied on re Appeal.

(14) Clerk's certificate.

(Note to Clerk: A concise statement of the facts to be relied on by Petitioners is appended to this designation.)

(15) Stipulations of the parties for correction of the transcript of record, dated April 28, 1950.

(Approved in the Board's Decision and Order of October 4, 1950, page 2, footnote 1.)

LATHAM & WATKINS,

By /s/ R. W. LUND,

Attorneys for Petitioners.

Dated May 29, 1951.

[Endorsed]: Filed May 31, 1951.

No. 12827

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO KATZ, MINDA KATZ, OTTO KATZ, LEEMOND KATZ,
PHIL KATES, DOROTHY KATES, ELY ELIAS, BERTHA
ELIAS, JULIAN ELIAS AND WALTER L. KERN d/b/a
LEE'S DEPARTMENT STORE,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the National Labor
Relations Board.

BRIEF FOR PETITIONERS.

PAUL R. WATKINS,
RICHARD W. LUND,
IRA M. PRICE, II,
411 West Fifth Street,
Los Angeles 13, California.
Attorneys for Petitioners.



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No. 12827

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO KATZ, MINDA KATZ, OTTO KATZ, LEEMOND KATZ,
PHIL KATES, DOROTHY KATES, ELY ELIAS, BERTHA
ELIAS, JULIAN ELIAS AND WALTER L. KERN d/b/a
LEE'S DEPARTMENT STORE,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the National Labor
Relations Board.

BRIEF FOR PETITIONERS.

Jurisdiction.

This case is before the Court on petition of the above-named Petitioners, doing business as Lee's Department Store, for a review of the order of the National Labor Relations Board, Respondent herein (hereinafter referred to as the Board), pursuant to Section 10(f) of the National Labor Relations Act, as amended [61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151 *et seq.*] (hereinafter referred to as the Act). The jurisdiction of this Court is based upon Section 10(f) of said Act. Petitioners are co-partners doing business as Lee's Department Store in the City of Huntington Park, County of Los Angeles, State of California, where the alleged unfair labor practices are asserted to have occurred.

The decision and order of the Board is set forth at pages 100-111 of the record. The consolidated complaint and the amendment thereto issued by the Board under which it held hearings and entered its order are set forth at pages 14-21 and 28-29, respectively, of the record. Petitioners' answer to the consolidated complaint and its amended answer to the consolidated complaint, as amended, are set forth at pages 26-27 and 29-33, respectively, of the record.

Statement of the Case.

On the 4th day of October, 1950, the Board issued its Decision, Findings of Fact, Conclusions of Law, and Order [91 N. L. R. B. No. 106, R. 100-111]. Its Findings and Conclusions, relative to these Petitioners, may be summarized as follows: The Board has jurisdiction over Petitioners because of their "participation in an association-wide bargaining group of employers, whose total volume of operations substantially affect commerce within the meaning of the Act"; Petitioners violated Section 8(a)(1), (2), and (3) of the Act for the reason that Petitioners "unlawfully enforced the illegal union-security (*sic*) provision" of a collective bargaining agreement executed December 17, 1948, between Petitioners and the Amalgamated Clothing Workers of America, Local Union No. 81, C. I. O. (hereinafter called the Amalgamated). The Board found that Petitioners had not, as charged in the consolidated complaint, committed any unfair labor practices by checking off Amalgamated dues from the pay of their employees.

The Board ordered Petitioners [R. 108-111] to cease and desist from renewing or enforcing any agreement with Amalgamated or any other labor organization which

requires their employees to join or maintain membership in such labor organization as a condition of employment, unless such agreement has been authorized as provided in the Act; from recognizing Amalgamated as the representative of their employees unless Amalgamated shall have been certified by the Board; from performing or giving effect to the contract of December 17, 1948, or any other agreement with Amalgamated until Amalgamated shall have been certified by the Board; and in any manner from interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist, Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection or to refrain from such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act. The Board further ordered Petitioners to withdraw all recognition from Amalgamated and to post appropriate notices.

On January 27, 1951 Petitioners filed with this Court their petition to review and set aside the order of the Board [R. 112-121]. On March 13, 1951, Respondent filed its answer to the petition [R. 121-129]. In said answer, Respondent alleged that the Findings of Fact, Conclusions of Law, and Order of the Board were valid and proper under the Act, and requested this Court to enforce its order.

The pertinent provisions of the Act are set forth in Appendix "A," *infra*, pp. 39 to 44.

Specification of Errors.

Petitioners submit that the Board made the following, among others, errors in its aforesaid Findings of Fact, Conclusions of Law, Order and Decision [R. 100-111]:

(1) The Board erred (a) in determining that Petitioners were engaged in commerce within the meaning of the Act, (b) in determining that it had jurisdiction over Petitioners because of "their participation in an association-wide bargaining group of employers, whose total volume of operations substantially affect commerce," or upon any other basis, (c) in exercising jurisdiction over Petitioners, and (d) in determining that the activities of Petitioners have a close and substantial relation to interstate commerce and tend to lead to labor disputes burdening or obstructing interstate commerce; these findings and conclusions are not supported by the evidence and are contrary to law.

(2) The Board's determination and finding that Petitioners violated Section 8(a)(1), (2), and (3), or any of said sections, of the Act by "keeping in existence" and "enforcing" the alleged union-security ("seniority") provision of the contract of December 17, 1948, between Petitioners and the Amalgamated, is not supported by the evidence and is contrary to law.

(3) The Board erred in refusing to dismiss the entire proceedings for failure of the General Counsel to join in an indispensable party in the proceedings below, as a party respondent, to wit, the Amalgamated.

ARGUMENT.

I.

The Board Erred in Determining That It Had Jurisdiction and in Attempting to Exercise Jurisdiction Over Petitioners' Operations.

A. The Business of Petitioners.

The undisputed facts bearing upon the jurisdictional question are as follows:

Petitioners operate a small department store, called Lee's Department Store, in Huntington Park, California which has the following departments: men's, women's, and children's apparel, jewelry, houseware, furniture and appliances, and shoes [General Counsel's Exs. 1-J, 1-U, R. 14, 29; R. 272]. Huntington Park is a small community, with a population of 28,648 according to the 1940 census, located near Los Angeles. The store employs about 60 full time employees [R. 273]. During the year ending November 24, 1948, Lee's Department Store purchased equipment, materials, supplies and merchandise of a value of approximately \$1,000,000, of which 30 per cent or \$300,000 in value, originated outside of California [General Counsel's Ex. 1-U, R. 29]. The store's sales are all to residents of the Southern California area, and it ships no merchandise out of this State [R. 287], as corrected by Stipulation correcting Record [R. 131]. From 70 to 75 per cent of its sales are made on credit [R. 273].¹ In brief, Petitioners are engaged in making retail sales, mostly on credit, of personal apparel and household merchandise to residents

¹Such sales do not necessitate out of state credit information [R. 252].

of the Huntington Park area at a single, small retail store in that community.

B. Statutory Basis and Limitation of Board's Jurisdiction.

The jurisdiction of the Board is bottomed on Article I, Section 8, Clause 3 of the Constitution of the United States which gives to the Congress of the United States power "to regulate commerce . . . among the several states". Section 10(a) of the Act gives to the Board jurisdiction to prevent a person "from engaging in any unfair labor practice affecting commerce". The scope of the Board's jurisdiction is delineated in Section 2 of the Act, which provides:

"(6) The term 'commerce' means traffic, commerce, transportation, or communication among the several States . . .

"(7) The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The Act does not empower the Board to regulate local activities, even though such activities may have some effect on interstate commerce. Predominantly local business operations and activities are subject to regulation only by the States. This principle is made clear in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937), where, in holding the original National Labor Relations Act² [49

²The definition of "commerce" and of "affecting commerce" set forth in Section 2 of the original National Labor Relations Act and the Amended Act are identical.

Stat. 449, 29 U. S. C., Supp. V, Title 29, Sec. 151 *et seq.*] constitutional under the commerce clause, the court declared (301 U. S. at 30, 31, 37; 57 S. Ct. at 621, 624):

“ . . . Undoubtedly the scope of this power [to regulate commerce] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

* * * * *

“Its [the original Act’s] terms do not impose collective bargaining upon all industry regardless of effects upon interstate commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds.

* * * * *

“The authority of the federal government may not be pushed into such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce ‘among the several States’ and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.”

In *National Labor Relations Board v. Mid-Co. Gasoline Co.*, 172 F. 2d 974 (C. A. 5th, 1951), the court observed (p. 978):

“It is quite clear from the decision in *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1; *Consolidated Edison Company of N. Y. v. N. L. R. B.*, 305 U. S. 197; *N. L. R. B. v. Fainblatt*, 306 U. S. 601; and *Wickard v. Filburn*, 317 U. S. 111; that the Act does not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce, and that in order to show that a particular operation—not itself in interstate commerce—affects such commerce in such fashion as to be subject to federal control, it must be made to appear that the business bears such a close and intimate relationship to such commerce, or has such a substantial economic effect on such commerce that a work stoppage in the employer’s plant would impede, burden, or obstruct interstate commerce or the free flow thereof.”

To the same effect is the decision in *National Labor Relations Board v. Baltimore Transit Co.*, 140 F. 2d 51, 54 (C. C. A. 4th, 1944), *cert. den.* 321 U. S. 795, 64 S. Ct. 847 (1944), in which the court commented:

“The test of the Board’s jurisdiction under the Act is, not whether the operations of the company constitute interstate commerce, but whether a stoppage of its operations by threatened industrial strife would result in substantial interruption to or interfere with the free flow of commerce.”

Even if it can be found that Petitioners’ business operations do or may affect interstate commerce in some small degree, the Board is not thereby invested with jurisdiction

over these activities. This principle was thoroughly examined and clearly applied in *National Labor Relations Board v. Shawnee Milling Company, d/b/a Pauls Valley Milling Company*, 184 F. 2d 57 (C. A. 10th, 1950). There the Board determined that the employer was subject to the Act because it was a branch of a parent company (Shawnee Milling Company) which admittedly was engaged in interstate commerce and which controlled all the policies, including labor policies, of its branch plant. Despite these facts and although the employer (branch plant) in this case was a substantial business enterprise, doing approximately \$1,000,000 in business annually, the circuit court held that the Board had no jurisdiction because (184 F. 2d at 59-60):

“ . . . The Board’s jurisdiction does not obtain merely because a local activity may in some indirect and remote way affect commerce.

* * * * *

“[Although the parent company supervised the labor policies of the local branch plant] such supervision does not . . . mean that the officers of the Shawnee Company could not exercise its policy with respect to the Pauls Valley Plant, separate and apart from any connection with any other of Shawnee Company’s plants or subsidiaries which were engaged in interstate commerce.”

* * * * *

“There is nothing in the record or in the stipulated facts which would warrant a finding that a labor disturbance in the Pauls Valley Plant would have an impact upon the operations at the Shawnee plant, or that the discontinuance of operations at Pauls Valley would cast an undue burden upon the operations of the plant at Shawnee.”

Brown v. Retail Shoe & Textiles Salesmen's Union, 89 F. Supp. 207 (N. D. Calif., 1950), involved the very kind of small, retail department store which these Petitioners operate. In that case the Board sought an injunction in the federal District Court under Section 10(1) of the Act against a union to enjoin a secondary boycott against an employer, A. E. Cramer Inc. The employer operated two retail department stores in San Francisco, California, and annually purchased merchandise for resale having a value in excess of \$240,000, approximately 60% of which was shipped from sources outside of the State of California.

The court refused to issue an injunction, on the ground that interstate commerce was not affected by the alleged unfair labor practices. Observing that "it is doubtful that the unfair labor charges affect interstate commerce in any substantial manner", the court declared (89 F. Supp. 209):

" . . . in all the cases cited by the plaintiff where jurisdiction has been assumed by the NLRB and approved by the courts either the total volume of business or the percentage of out of state purchases was far in excess of that involved in this case. In many of the cases the retail establishment sold at least a small portion of its products across state lines. It seems clear that from the latest decisions of the NLRB that the Board considers the operations of the type involved in this case are essentially local in character and that to assert jurisdiction would not effectuate the policies of the Act."

Further, in *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C. C. A. 9th, 1939), the employer company was engaged in the production of gold, purchasing \$125,000 of supplies and equipment annually from outside the state and selling annually over \$3,000,000 of gold to the United States Mint at San Francisco, California. The court set aside the Board's determination that the employer was engaged in commerce within the meaning of the Act, and dismissed the petition for enforcement of the Board's order, reasoning (98 F. 2d 131):

“ . . . There is no evidence that its [employer's] activities have any close, intimate, or substantial relation to such commerce, or that such commerce or the free flow thereof would be obstructed by any dispute to which respondent's labor practices might lead.”

Measured against the jurisdictional standards laid down in the Constitution and in the Act, and as more fully described in the authorities cited above, the business activities of Petitioners are of such a minor and essentially local character that they are not subject to the Board's processes or powers. The business of such a small retail department store in a small California community is not, we submit, one which “affects commerce”, or which bears a “close and intimate relationship to such commerce”, or in which a “work stoppage would impede, burden, or obstruct interstate commerce or the free flow thereof”.

C. The Board Has Regularly Declined to Take or Exercise Jurisdiction Over Business Operations Similar to Petitioners.

In recognition of the constitutional and statutory limitations upon its power over employer-employee relations, the Board in a long line of decisions has regularly refused to attempt to assert jurisdiction over small local business enterprises. The Board in these decisions has recognized and announced the obvious fact, that an attempted exercise of jurisdiction over business operations which are essentially local in character would not effectuate the policies of the Act, even though the local activity may in some indirect and remote way "affect commerce". *Wawina Co-Op Soc.*, 79 N. L. R. B. 1243 (1948), general retail merchandise store; *Josephs*, 88 N. L. R. B. 11 (1950), retail clothing store; *Hom-Ond Food Stores*, 77 N. L. R. B. 647 (1948), a chain of 13 retail grocery stores; *Jacobs Pharmacy Co.*, 87 N. L. R. B. 309 (1949), a chain of 16 retail drug stores; *Purity Creamery Co.*, 79 N. L. R. B. 1042 (1948), a chain of 9 retail dairy stores; *A-1 Photo Service*, 83 N. L. R. B. 564 (1949), and *Sun Photo Co.*, 79 N. L. R. B. 1278 (1948), photo supplies and retail stationery; *Cordle Sash, Door & Lumber Co.*, 79 N. L. R. B. 578 (1946), lumber plant and retail lumber and hardware store; *Hubby-Reese Co.*, 72 N. L. R. B. 1404 (1947), wholesale grocery; *Olympia Stadium Corp.*, 85 N. L. R. B. 389 (1949), sports arena; *Betty & Berts*, 87 N. L. R. B. 248 (1949), market and cafe; *O'Rourke Baking Co.*, 79 N. L. R. B. 1456 (1948), wholesale baking company; *White Sulphur Springs Co.*, 85 N. L. R. B. 1487 (1949), a hotel; *Conlon Baking Co.*, 81 N. L. R. B. 934 (1949), a local baker; *Bailey Slipper Shop, Inc.*, 84 N. L. R. B. 341 (1949), retail shoe store;

Morris C. Lebowitz, 88 N. L. R. B. 11 (1950), retail clothing store.

As we have stated above, Petitioners make no out-of-state sales and of some \$1,000,000 worth of purchases of merchandise, supplies and equipment, only about \$300,000 originate from outside the State of California.

In a number of the cases cited above, the out-of-state volume far exceeded that involved in the instant case. Thus, in the *Conlon Baking Company* case, supplies and materials in the amount of \$700,000 were purchased outside of the state. Similarly in the *Hubby-Reese Company* case, supplies and materials amounting to \$345,000 were received directly from outside of the state, and \$1,155,000 in purchases originated out of the state.

In *Josephs*, 88 N. L. R. B. 11 (1950), a retail men's and boy's clothing store over a seven months period had out-of-state purchases of \$110,000 (amounting to \$190,000 on an annual basis) and sales out-of-state in the sum of \$10,000 (amounting to \$17,000 on an annual basis). Similarly, in *Squires, Inc.*, 88 N. L. R. B. 8 (1950), the employer operated three retail men's clothing stores in and around Los Angeles. During a six month period, purchases in the sum of \$162,400 (amounting to \$324,800 on an annual basis) were shipped to the stores from outside of California; the stores had only a small amount of out-of-state sales. In both of these decisions the Board unanimously declined to take jurisdiction, all four members participating. In doing so, the Board expressly overruled the case of *King Brooks, Inc.*, 84 N. L. R. B. 652 (1949), in which jurisdiction had been taken over a retail clothing and furnishing store with annual out-of-state purchases of \$378,000. Subsequently in *Evans Fur Co.*, 88 N. L. R. B. 1095 (1950), the Board de-

clined to take jurisdiction over two jointly controlled and operated retail apparel stores that annually purchased out of the state a total of over \$640,000 of materials.

Further, in *Hook Drugs, Inc.*, 90 N. L. R. B. No. 249, 26 Labor Relations Reference Manual (hereinafter designated L. R. R. M. 1391) (1950), the Board declined to assert jurisdiction over an employer who operated fifty-three retail drug stores throughout the State of Indiana, although the employer had purchased merchandise in an annual amount of \$8,000,000, of which 98% was shipped directly from points outside Indiana. Similarly, in *Quigley's Department Store, No. 3*, 89 N. L. R. B. 381 (1950), the Board refused to take jurisdiction over an employer who operated one of seven variety five and ten cent stores in Los Angeles County, California. The employer made annual purchases of \$260,000, of which 45% was shipped directly from outside the state; purchases for the other six stores of the chain totaled \$441,000, of which 25% were purchased directly from outside the state. In *Hawkeye Lumber Co.*, 89 N. L. R. B. 1515 (1950), the employer was held not to be subject to the Act although he operated twenty-two retail lumber yards throughout the State of Iowa, making annual purchases of \$2,000,000, of which 70% or \$1,400,000 in value was purchased from outside the state. In each and all of these decisions, which are among the most recent and pertinent by the Board, the Board based its decision upon the essentially local character of the employer's business operations.

The Board on October 3, 1950, established jurisdictional yardsticks to provide definite standards for determining whether the Board will take jurisdiction of a business or whether the operations of that business are

so essentially local that the Board will not act. Under the established criteria, the Board in general determined that it would only take jurisdiction over an enterprise which makes (a) direct out-of-state sales in an annual amount of at least \$25,000 (*Stanislaus Implement and Hardware Co. Ltd.*, 91 N. L. R. B. No. 116, 26 L. R. R. M. 1548 (1950)), or (b) at least \$50,000 worth of sales to instrumentalities of interstate commerce (*Hollow Tree Lumber Co.*, 91 N. L. R. B. No. 113, 26 L. R. R. M. 1543 (1950)), or (c) a minimum of \$500,000 in direct interstate purchases (*Federal Dairy Co. Inc.*, 91 N. L. R. B. No. 107, 26 L. R. R. M. 1538 (1950)), or (d) at least \$1,000,000 in indirect interstate purchases (*Dorn's House of Miracles, Inc.*, 91 N. L. R. B. No. 82, 26 L. R. R. M. 1545 (1950)). See *Fifteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1950*, pages 5 and 6 thereof.

It is clear that the business operations of Petitioners herein do not meet any one of the jurisdictional tests established by the Board itself. Accordingly, under the Board's express rulings, the activities of Petitioners' business are not subject to the Board.

Except for its decision in the instant case, the Board has consistently applied the jurisdictional standards promulgated on October 3, 1950. Thus, for example, in *McMahan's of Santa Ana and Lynwood*, 91 N. L. R. B. No. 183, 26 L. R. R. M. 1622 (1950), the Board refused to assert jurisdiction over an employer who operated a chain of four furniture stores whose out-of-state purchases equalled \$161,141 of \$995,665 in total purchases. In *MacFarlane's Candies*, 91 N. L. R. B. No. 194, 27 L. R. R. M. 1001 (1950), an employer who operated thirty-one retail candy stores throughout California, with

\$393,000 in purchases from outside the state and \$7200 out-of-state sales, was held to be outside the jurisdictional standards of the Board. Similarly, in *American Paper Co.*, 91 N. L. R. B. No. 163, 26 L. R. R. M. 1595 (1950), the Board declined to assert jurisdiction over an employer who purchased \$175,000 worth of materials directly and \$25,000 indirectly from outside the State.

Upon the basis of the above cited authorities, the Board cannot assert jurisdiction over Petitioners' small retail operations. Viewed in the light of these precedents and of the above cited jurisdictional standards, the essentially local character of Petitioners' business operations removes them from the scope of the Act.

D. Asserted Jurisdiction on the Basis of Alleged Participation in Association of Employers.

In its decision and order [R. 100-111], the Board recognized that it could not assert jurisdiction over Petitioners' local business activities on the basis of these activities alone. However, to create jurisdiction synthetically, the Board found that it had jurisdiction over Petitioners because of "participation in an association-wide bargaining group of employers, whose total volume of operations affect commerce within the meaning of the Act" [R. 100].

The Board erred in asserting jurisdiction over Petitioners upon the above-quoted basis, or upon any basis whatsoever, because (1) Petitioners were not members of any association of employers during any period here in issue, and (2) had Petitioners been members of such an employer association, that fact could not change the essentially local nature of the business operations involved.

1. NO EMPLOYER ASSOCIATION IS HERE INVOLVED.

Concerning the alleged "association-wide bargaining group of employers" of which the Board found Petitioners were members, the consolidated complaint, as amended, merely alleges:

"6(a). Respondent Federal and Respondent Lee's are members of Credit Stores Association which, on behalf of all of its members, did enter into the contract described in paragraph 8 of the consolidated complaint . . ." [General Counsel's Ex. 1-R, R. 28-29].

"8. Respondent Federal and Respondent Lee's . . . on or about December 17, 1948, entered into a joint written, exclusive collective bargaining agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO . . ." [General Counsel's Ex. 1-J, R. 16].

Petitioners in their Amended Answer [General Counsel's Ex. 1-U, R. 30-31] denied all the allegations of paragraph 6(a) and the allegation in paragraph 8 that the agreement was "joint".

The undisputed testimony in connection with the Credit Stores Association is as follows: The association was formed in 1937 by a number of the members of the Southern California Merchants Association who had labor contracts with the A. F. of L. Central Labor Council [R. 168, General Counsel's Ex. 2, R. 199-213, 232-233]. The purpose was to attempt to keep peaceful relations, enforce the contracts, and arbitrate any differences between the companies and labor unions of the A. F. of L. Central Labor Council (*ibid.*).

In 1941, a number of the members of Credit Stores Association signed contracts with the C. I. O. while others

continued with the A. F. of L., and dissension was created among the members [R. 173-174]. Inasmuch as contractual relations with the A. F. of L. was one of the express conditions of becoming a member of the Association [General Counsel's Ex. 2-B, R. 232-233], when this A. F. of L.-C. I. O. schism developed, the Association ceased to be effective, was silently abandoned, and ceased to function thereafter [R. 167, 171-175, 230-233].

Contrary to the allegations of the complaint, therefore, Petitioners are not, and were not in December, 1948, or at any other period here in issue, members of the Credit Stores Association since that Association does not exist and has not existed since 1941. For the same reason that Association did not, as alleged, enter into the December 17, 1948, contract with the C. I. O. on behalf of its members. The facts concerning that contract are as follows: Frank Guyon,³ an attorney and manager of the Southern California Merchants Association and one

³The General Counsel and the A. F. of L. attorneys sought unsuccessfully to impeach the General Counsel's own and only witness on this phase of the case. That witness explained certain statements he may have made to the NLRB field examiner—he did not recall making them and no evidence was offered that he did—as follows: He had not had occasion earlier to consider whether or not the Association has ceased to be effective or when; without giving it a thought, he probably assumed that the Association had continued to exist; upon reflection, however, and upon consideration of the events of 1941 and later, he had to conclude that it had been abandoned in 1941 [R. 167, 168, 171-174, 229-231, 261-263].

The undisputed facts are that since 1941 there have been no meetings of "members," officers, or directors, no elections of officers or directors, no appointment of committees, no board of director's attempt to arbitrate or interpret issues of contract interpretation—one of the principal reasons for the formation of the Association—although many of such questions have arisen, and no one purporting to act as an officer or director [R. 168-170, 173-174, 257-258, 262-264].

time Secretary of the Credit Stores Association [R. 166, 168-169], had represented Petitioners, Federal and other stores for many years [R. 166]. As of the fall of 1948, Petitioners, Federal and other retail credit stores were operating under a contract with Amalgamated, dated January 31, 1947, and openable as of January, 1948 [General Counsel's Ex. 3]. During the fall of 1948, the Union representative had indicated to the various store owners and to Mr. Guyon that the employees wanted a wage increase [R. 183]. Because Mr. Guyon was going to be out of the city in January, 1949 and the stores were busy around Christmas, it was decided to attempt to conclude negotiations sometime before Christmas [R. 183-184]. Representatives from each of the stores met with Mr. Guyon to discuss the matter and asked him to gather comparative wage data [R. 184-185]. Mr. Guyon made such a study and representatives of the stores, including Petitioners, then met with Mr. Guyon again around December 10, 1948, a few days after the first meeting, and each firm representative present, including Petitioners, individually approved a scale of wages to submit to the Union [R. 185-186, 260-261].⁴

The proposed schedule was then presented to the Union representative who approved the same [R. 186]. Mr. Guyon then had a new contract with this scale typed and mimeographed [R. 186], and this was then executed on December 17, 1948 [General Counsel's Ex. 4; R. 267, 280]. At the time of these negotiations, Mr. Guyon was acting on behalf of each of the stores individually as the

⁴No one from Browns was present, so Mr. Guyon called Browns and got an okeh to present the same wage scale on behalf of that store [R. 266-267].

labor relations attorney of each, and was paid separately by each store for this service [R. 188-189, 261-262, 265-266].

The contract is clearly not a "joint" agreement. It was executed by each store individually [General Counsel's Ex. 4, R. 214-225 at page 223], and as in the case of the 1947 contract [General Counsel's Ex. 3, R. 203-213], the agreement specifically provides (Art. XI):

"It is understood that this agreement is executed by the Employers severally, that no signatory Employer shall be liable for any breach of this agreement by any other Employer and that no default or breach by any Employer shall constitute a default or breach by any other Employer."

The defunct Credit Stores Association is not a party to the agreement nor did it have any part in the negotiation or consummation of the same.⁵

The situation then is simply this. For a number of years several stores, varying from time to time, have negotiated individually, with the assistance of their attorney, Mr. Guyon, separate but uniform contracts. There

⁵It is, of course, true that the opening part of the agreement states that it is a contract between the Union and "signatory members of the Credit Stores Association" and that immediately above the signatures appear the words "Members of Credit Stores Association." This, however, has no significance. Anyone familiar with the negotiation and drafting of contracts, knows that it is the common practice when a renewal contract is agreed upon simply to have the old contract retyped with the changes in substantive language agreed upon. Hence, it often happens that outmoded and inapt language is carried forward from contract to contract. So in the instant case, the reference to "Members of Credit Stores Association" was simply carried forward from contract to contract in copying without anyone giving a thought to deletion of the same as inappropriate [R. 261-262].

is here no association negotiating or executing contracts and no joint contract. Under such circumstances, the allegations of paragraphs 6(a) and part of paragraph 8 of the consolidated complaint, as amended, are contrary to the fact, and clearly unsupported by the evidence.

2. LACK OF JURISDICTION IN ANY EVENT.

Even if the preponderance of evidence had supported a finding that the Credit Stores Association did in 1948 exist and that these Petitioners and other stores bargained through that Association, jurisdiction is not thereby conferred upon the Board, nor would its asserted jurisdiction effectuate the policies of the Act.

The fact that Petitioners belonged to and bargained through an employer association could not and would not change the essentially local character of the operation of the retail store involved. Despite that assumed fact, Lee's Department Store remains the typically small town retail department store which carries on exclusively a local business with residents of Huntington Park, California. The association of Lee's Department Store with several other independent retail stores for collective bargaining purposes would not and does not mean that its labor policies and practices could not be exercised separate and apart from those of other association members. Indeed, the evidence is uncontradicted that in 1941 the Association members differed so widely in their labor practices that (a) some members ceased recognizing the A. F. of L. Union and executed contracts with Amalgamated (C. I. O.), (b) several of such members later dropped their contracts with Amalgamated and turned again to the A. F. of L. Union, and (c) that still other

members refused to recognize Amalgamated but continued to bargain with and to recognize the A. F. of L. union [R. 173, 174]. This schism among Association members in 1941 continued thereafter [R. 174] and was the principal cause of the abandonment of the Association [R. 167, 171-175, 230-233].

Upon undisputed facts much stronger and more favorable for finding jurisdiction than anything appearing in this case, the Board has repeatedly determined that it would not effectuate the policies of the Act for the Board to attempt to exert jurisdiction over a member of a group or association of employers.

For example, in *Contra Costa Retail Druggist Association*, 90 NLRB No. 280, 26 L. R. R. M. 1412 (1950), the Board unanimously refused to take jurisdiction over an association of *twenty-nine* retail drug stores whose total annual purchases alone were in excess of \$2,000,000, of which about \$400,000 represented purchases of goods shipped directly from out-of-state. The Board reasoned that the operation of a retail drug store was essentially local in character.

Further in *Fehr Baking Co.*, 79 N. L. R. B. 440 (1948), the Board declined to take jurisdiction over *nine* bakeries that supplied 85% of the requirements of the city of Houston, Texas, and surrounding territory although the annual out-of-state purchases amounted to \$1,470,000. In *Detroit Canvas Manufacturers Association*, 80 N. L. R. B. 266 (1948), the Board refused to take jurisdiction over an association of *ten* companies engaged in manufacturing, selling, and installing awnings and canvas tents who purchased \$293,750 worth

of materials and made sales out of the state totalling \$118,635.

Reviewing courts have recognized and applied the principle that mere association in a multi-plant or employer group does not change the character of a local enterprise. *National Labor Relations Board v. Shawnee Milling Company*, 184 F. 2d 57 (C. A. 10th, 1950); *Brown v. Retail Shoe & Textiles Salesmen's Union*, 89 Fed. Supp. 207 (N. D. Calif. 1950). See also *National Labor Relations Board v. Santa Cruz Fruit Company*, 91 F. 2d 790 (C. C. A. 9th, 1937), aff'd 303, U. S. 453, 58 S. Ct. 656 (1938), where the court held that the jurisdiction of the Board did not extend to a branch plant of a corporation engaged solely in intra-state activities, although the corporation, which was concededly engaged in inter-state commerce, was held subject to the original Act.

Carpenter & Skaer, Inc. et al., 90 N. L. R. B. No. 78, 26 L. R. R. M. 1223 (1950), cited by the Board in its decision and order [R. 101], is not authority for the present asserted jurisdiction over Petitioners. First, the association there involved was composed of forty-two general contractors and eighty subcontractors who performed 90% of the industrial and commercial construction in Erie County, New York, involving an annual volume of business in the amount of approximately \$20,000,000, of which amount approximately \$2,000,000 represented purchases of materials from outside the state and a substantial number of whose construction jobs were for firms engaged in interstate commerce. Here the alleged Credit Stores Association never comprised more than six members [R. 224-225] whose total annual

volume of out-of-state purchases was only about \$750,000 [R. 101]. Secondly, there the Board asserted jurisdiction over the employer association because “the alleged unfair labor practices are attributed to the Association itself . . .”; here the Association is not charged with any unfair labor practices and none of the alleged unfair labor practices are attributed to the Association. Thirdly, there the association itself was a party to the complaint and to the proceedings; here the Association was not joined in the complaint, was not a party to the proceedings, and only two of its alleged members were before the Board.

Upon these undisputed and undisputable facts, we submit that the decision of *Carpenter & Skaer, Inc., et al.*, 90 N. L. R. B. No. 78, 26 L. R. R. M. 1223 (1950), does not authorize, and is not a precedent for, the Board’s attempted assertion of jurisdiction over Petitioners in this action.

If mere association of small retail stores into a “bargaining group of employers” were sufficient in itself to give the Board jurisdiction over each of such stores, no matter how small or how local its individual activities, then there is no practicable limit to the Board’s reach of power. In view of the strong movement among employers to meet the bargaining strength of unions by negotiating through association, every one of our traditionally local business activities—including the corner grocery store, the local meat market, the one-chair barber shop, the shoe shine parlor—would be swept within the ambit of Board jurisdiction upon the mere joining of several of such employers into an “association.” The obvious result of such an extension of Board power over

internal business affairs would be the imposition of the Board's policies and processes upon the whole of American business life regardless of effects upon interstate commerce, the abolition of any "distinction between what is internal and what is local in the activities of commerce," and the creation of "a completely centralized government." See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937).

We strongly urge that even if the Board is found to have jurisdiction in the instant case, its exercise of jurisdiction here will deprive Petitioners of due process of law, of equal protection of laws, and of an equal application of the Act. Cf., *Sims v. Rives*, 84 F. 2d 871 (C. A. D. C., 1936) cert. den. 56 S. Ct. 960, 290 U. S. 682 (1936). We have shown above that in numerous cases involving retail stores whose operations are no more local in nature than Petitioners' activities, the Board has declined to assert its jurisdiction. Some of these decisions concern retail stores in the very same county, Los Angeles County, in which Petitioners' store is located (*Squires, Inc.*, 88 N. L. R. B. 8 (1950); *Quigley's Department Store, No. 3*, 89 N. L. R. B. 381 (1950); *McMahan's of Santa Ana and Lynwood*, 91 N. L. R. B. No. 183, 26 L. R. R. M. 1622 (1950). Under such circumstances, the Board's attempt to single out Petitioners' store and to subject its activities to the Board's processes and orders constitutes an unlawful and discriminatory application of the Act which violates the constitutional guarantees of the Fifth Amendment to the Constitution of the United States.

Section 10(c) of the Act requires that a finding of an unfair labor practice must be based upon "the pre-

ponderance of the testimony taken”; a complaint must be dismissed “if upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practice.” Concerning judicial review of Board orders, Section 10(e) and of Section 10(f) of the Act provide that upon a petition to enforce or to review an order of the Board, “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall [‘in like manner’ (Sec. 10(f))]⁶ be conclusive.”

⁶The Amended Act’s requirement (Section 10(c)) that Board findings must be based upon “the preponderance of the testimony taken” changed the original Act’s provision (Section 10(c)) that the Board’s findings must be based upon “all the testimony taken.” The Amended Act’s requirement (Sections 10(e) and (10(f)) that Board findings must be supported by “substantial evidence” modified the original Act’s requirement (Sections 10(e) and 10(f) thereof) that findings of the Board must be supported merely “by the evidence.” The new language was adopted because of the dissatisfaction of members of Congress with some Board decisions which seemed to rest upon inadequate proof, and because of criticism from many quarters that some reviewing courts had “abdicated” to the Board by affirming Board orders which were substantiated only by “some evidence.” The new provision, requiring Board findings to be supported by “substantial evidence,” was intended by its framers to “very materially broaden the scope of the court’s reviewing power,” to “insure its [Board’s] deciding in accordance with the preponderance of the evidence,” and to preclude “the substitution of expertness for evidence in making decisions.” *Conference Report, House Report 510*, 80th Cong., pp. 55-56; *Senate Report 105*, 80th Cong., pp. 26-27. For an excellent discussion of these matters, see *Universal Camera Corp. v. National Labor Relations Board*, 71 S. Ct. 456 (Feb. 26, 1951).

We submit that, because of the above recited facts, the findings of the Board, (a) that Petitioners' Lee's Department Store was a member of "Credit Stores Association . . . whose representatives negotiated a contract with the Amalgamated on December 17, 1948, the terms of which apply to all employees of the six employers" [R. 101] and (b) that Petitioners participated "in an association-wide bargaining group of employers" [R. 101] were not based upon the preponderance of the evidence and were not supported by substantial evidence. Indeed, the evidence is almost uncontradicted to the contrary.

For the foregoing reasons, the Board's exercising of jurisdiction over Petitioners was erroneous and illegal and its order directed against Petitioner should now be set aside by the Court. Cf. *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C. C. A. 9th, 1939); *National Labor Relations Board v. Pittsburgh Steamship Co.*, 71 S. Ct. 453 (Nov. 6, 1950); *John S. Barnes Corp.*, 190 F. 2d 127 (C. C. A. 7th, 1951).

II.

The Board's Findings of Fact Relating to the Alleged Unfair Labor Practices Are Not Supported by Substantial Evidence and the Board's Order Is Improper and Illegal.

A. The Pleadings.

Petitioners were charged in the consolidated complaint [R. 14-21] with entering into and enforcing with the Amalgamated union a so-called union shop contract. The allegations of the complaint as amended (disregarding the allegations which were dismissed) are contained principally in paragraph 8, which provides (changing it to the singular and omitting reference to the other respondent below, Federal Stores Division of Spiegel, Inc.):

“Respondent Lee's, by its officers, agents and employees while engaged in its business as described in paragraphs 3 and 4, above, on or about December 17, 1948, entered into a . . . written exclusive collective bargaining agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, covering wages, rates of pay, hours of employment and other conditions of employment of Respondent Lee's employees; which agreement provided, in part, as follows:

“‘ARTICLE V, MEMBERSHIP IN UNION

“‘1. Members of the Employers' families, store managers, one head book-keeper, one stenographer-secretary, and bona fide department heads who have the duty of directing the work of two or more employees in their respective departments, shall not be subject to

the jurisdiction of the Union and shall be excepted from all provisions of this agreement.

“2. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees at present employed in the classifications specified in Article II, shall become members of the signatory Union within fifteen (15) days after the effective date of this agreement or shall be discharged by the Employer.

“3. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees in the classifications specified in Article II and who are hired after the effective date of this agreement shall become members of the signatory Union within 30 days after the date of their employment or shall be discharged by the Employer.’

“At all times since on or about December 17, 1948, Respondent Lee’s and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, have enforced and given effect to said agreement and all renewals and extensions thereof and have required membership in the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as a condition of employment.”

Union shop contracts are not *per se* illegal under the Act, and paragraph 8 of the amended complaint does not allege that there was any illegality merely because of the execution and enforcement of a union shop provision. Under Section 8(a)(3) of the Act, union shop conditions are made illegal under only any one of three circumstances: (1) when the Union contracting party was “established, maintained, or assisted by any action

defined in section 8(a) of this Act as an unfair labor practice”; (2) if the Union is not “the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made”; or (3) if the following condition has not been satisfied: “following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.” In the instant case the agreement is claimed to be illegal under the third condition, paragraph 12 of the complaint alleging in this connection that the agreement “is illegal and invalid” “by reason that no union authorization election in accordance with Section 9(e) of the Act has been held.”

The execution and enforcement of the agreement and the lack of a so-called UA election have been admitted by Petitioners [General Counsel’s Ex. I-U; R. 31]. Nevertheless, even assuming the applicability of the Act to Petitioners, we submit that the evidence does not support the findings of the Board that Petitioners violated the Act.

B. Inadequacy of Charge.

Prior to the amended Act, it was the regular practice of the Board to issue complaints which were broader than the charge. We submit, however, that the amendments enacted into the amended Act now make that improper.

Under Section 10(b) of the Act, as amended, “no complaint shall issue based upon any unfair labor prac-

tice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.” What is the purpose of such a provision? Obviously, to permit a person to know that he is being charged with having committed certain illegal acts so he can preserve his evidence. This is made clear by the Report of the House Committee on Education and Labor on the Taft-Hartley Bill (H. R. 3020):

“A more important change is one that requires charging parties to file their charges within 6 months after the unfair practice is alleged to have occurred, and that requires the administrator to issue the complaint within 6 months after the charge is filed. It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.” (*H. Rep. No. 245*, 80th Cong. 1st Sess., April 11, 1947, p. 40.)

If the service of the charge is to furnish the person charged with sufficient information to be able to collect and preserve his evidence, obviously the charge must contain allegations of specific illegal acts. Furthermore, if this were not required, the proviso of Section 10(b) could be circumvented simply by the service every six months of a printed form charging in the most general language violations of each provision of the Act. Clearly, therefore, if the proviso is to be satisfied, the charge must specify with some particularity the acts of illegality.

In the instant case, the charge [General Counsel's Ex. 1-G; R. 9-12] does in some detail allege a violation

of Section 8(a)(3) but alleges in only the most general terms a violation of Sections 8(a)(1) and 8(a)(2) of the Act. It makes no reference to any agreement or union shop conditions or the lack of any so-called UA election. Under such circumstances, we submit that the Board improperly issued its complaint charging Petitioners with a violation of the Act by entering into and enforcing a union shop contract without a Section 9(e) election. Such allegations should, therefore, have been dismissed and the Board's order based thereon is, we submit, illegal.

C. Bar of Statute of Limitations.

Assuming the sufficiency of the charge so far as detail is concerned, nevertheless the allegations of the complaint should have been dismissed, and the Board's order based upon such allegations is illegal, because the charge was not served within the six months period prescribed in the proviso in Section 10(b) of the Act.

It is clear that the mere execution of a contract containing an illegal union security condition constitutes at that time a violation of the Act. *Great Atlantic & Pacific Tea Co.*, 81 N. L. R. B. 1052 (1949); *C. Hager & Sons Hinge Mfg. Co.*, 80 N. L. R. B. 163 (1948); *Julius Resnick, Inc.*, 86 N. L. R. B. 10 (1949). The agreement here involved was executed on December 17, 1948 [General Counsel's Ex. 4; R. 214]. Assuming for purposes of argument that it contained illegal union security provisions, Petitioners violated the Act in this respect on December 17, 1948. To challenge this illegality, a charge would have to have been filed *and served* not later than June 17, 1949. However, the Board found that the charge against Petitioners was not served until

June 21, 1949 [R. 40]. It was not, therefore, served in time, and these allegations of the complaint should have been dismissed by the Board.

It is no answer to this necessary conclusion to contend that the union shop conditions constituted a continuing violation. If such an argument were sound, the statute of limitations provision would be a nullity. In a similar situation the Board has clearly rejected such a contention. In *Goodall Co.*, 86 N. L. R. B. 814 (1949), the Board approved the intermediate report which read, in part, as follows (page 32):

“On July 12, 1948, the Respondent granted a 10% wage increase to all of its employees at the Talle-dega plant. The General Counsel contends that it was designed to discourage membership in the Union. For the reasons set out below, a determination of that question is unnecessary.

“The charge was filed on January 19, 1949, more than six months after the increase became effective, and the question arises whether the statute of limitations contained in Section 10(b) bars the issuance of a complaint based on the rise in wages. It may be asserted that where a wage increase violates Section 8(a)(1), it constitutes a continuous violation because it is reflected in weekly or other recurring salary payments, periodically reminding employees that they do not need the assistance of a union or of collective bargaining, and thus constitutes a continuing interference with the employees’ right of self organization. The examiner does not agree with that view. If tenable with respect to a wage increase, the theory should apply equally to a discriminatory discharge, for an unlawful dismissal

affects not only the employee involved, but is often a continuing discouragement of union activities by other employees. Yet, there is no doubt that the six-month limitation for the filing and service of a charge based upon a discriminatory discharge begins to run from the date of the discharge. In the opinion of the Examiner, the averments of the complaint pertaining to the wage increase are based because the charge was filed more than six months after the increase became effective. The Examiner will recommend that such allegations be dismissed.”

The above observations apply equally to the execution and enforcement of an illegal union shop contract.

We submit, therefore, that the Board’s findings of fact and its order are unlawful because the charge against Petitioners was filed too late.

D. No UA Election Was Required.

The agreement of December 17, 1948, did not impose union shop conditions. The identical union shop provisions were contained in the agreement of January 31, 1947 [General Counsel’s Ex. 3; R. 207]. Since that agreement was prior to the passage of the amended Act, the union shop conditions therein were perfectly valid and legally effective after the passage of the Act (Sec. 102 of Act). Article XII of that contract, in effect, provided for the continuance of the contract to January 31, 1950, with a wage reopening provision as of January, 1949 [General Counsel’s Ex. 2-B; R. 203, 212]. The agreement of December 17, 1948, was merely an amendment of the 1947 agreement upon the wage-reopening. *It only changed the wage rates in the 1947*

contract. The union security provisions and other terms of the 1947 contract were not changed in any way.

Certainly, if the parties had merely signed a wage supplement to the 1947 contract, the union shop conditions therein would have continued to be valid. *Cf. Greenville Finishing Co.*, 71 N. L. R. B. 436 (1946). We do not believe that because they chose to retype the agreement and incorporate the changed wages in the same document the legal effect should be different and the union shop conditions held illegal. Substance, not form, must control. Hence, the union shop provisions in the December 17, 1948, contract are not illegal, and the finding of fact of the Board that such provisions were unlawful is without support in the record.

We submit, therefore, that the Board's findings of fact respecting Petitioners are not supported by substantial evidence and its order directed against Petitioners is unlawful because (a) the charge filed against Petitioners upon which the complaint was based was so vague and general as not to apprise Petitioners of the alleged illegal acts; (b) the complaint, the Board's findings of fact and its order are barred and void because the charge was not filed within the six months period prescribed by Section 10(b) of the Act; (c) union shop provisions were not imposed by the agreement of December 17, 1948, but were imposed by the agreement of January 31, 1947; the latter agreement having been made prior to the passage of the amended Act, its union shop conditions and their enforcement were valid and legally effective during all the times mentioned in the complaint.

III.

The Board Erred in Refusing to Dismiss the Entire Proceedings for Failure of General Counsel to Join Amalgamated as a Party Respondent.

The union shop conditions in the contract which the Board found unlawful in its decision and order [R. 102], were inserted at the request of the Amalgamated Clothing Workers of America, Local Union No. 81, C. I. O. and obviously the Amalgamated was the chief and sole beneficiary of the contract [R. 269]. Clearly, therefore, if these contract provisions are illegal, the principal offender is the Amalgamated and General Counsel should have proceeded jointly against that union.

Amalgamated is named as a "Party to the contract" in the consolidated complaint [General Counsel's Ex. 1-J; R. 13]. However, no charge was filed against Amalgamated [General Counsel's Exs. 1-A and 1-G; R. 3, 9]. The consolidated complaint neither named the Amalgamated as a party respondent nor complained of any act or action of Amalgamated [General Counsel's Ex. 1-T; R. 13-21]. Amalgamated filed no answer to the consolidated complaint [R. 142, 143]. The order of the Board does not run against, and is not directed to, Amalgamated in any way [R. 101-111].

These Petitioners (respondents in the proceedings before the Board) moved the Trial Examiner to dismiss the proceedings for failure of General Counsel to join the Amalgamated as an indispensable party respondent to the proceedings [R. 151]; this motion was denied [R. 152].

The order of the Trial Examiner denying said motion of Petitioners and the affirmance of such order by the Board constituted fatal errors which, we submit, invalidated the whole proceedings. The Amalgamated was a necessary party respondent in the Board action for, as we have said, it was the chief beneficiary and the initiator of the contract which the Board has declared invalid. The Board's order and decision destroys the contract of Amalgamated and casts the entire blame for the contract's execution and enforcement upon Petitioners, although Amalgamated was not put to proof to sustain the agreement or otherwise made to defend its previous participation in the making and enforcing of the contract. Under such circumstances we submit that the Board lacked jurisdiction over the subject matter of the agreement which its order declares illegal, and that Petitioners were denied due process of law and the "basic concept of fair play" in the proceedings below. Cf. *National Labor Relations Board v. Portland Cement Co.*, 108 F. 2d 198 (C. C. A. 9th, 1939); *Consolidated Edison Co. of New York, Inc. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938).

Conclusion.

It is submitted that the Board's order relating to Petitioners is illegal, void and unenforceable because (a) the Board has and had no jurisdiction over Petitioners, (b) its findings of fact relating to the alleged unfair labor practices charged against Petitioners are not supported by substantial evidence, and (c) the Board fatally erred in not dismissing the complaint against Petitioners for failure of General Counsel to join the Amalgamated Union as an indispensable party respondent in the Board proceedings. The Board's decision and order (except that portion of the order dismissing the complaint insofar as it alleges that Petitioners committed unfair labor practices by checking off the Amalgamated dues from the pay of their employees) should be set aside by order of this court and Petitioners, their agents, successors, and assigns, should be relieved from the necessity of complying therewith.

Dated: September 12, 1951.

Respectfully submitted,

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RICHARD W. LUND,
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Attorneys for Petitioners.

APPENDIX A.

National Labor Relations Act, as Amended.

The pertinent provisions of the National Labor Relations Act, as amended [61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151 *et seq.*] are as follows:

Section 2. When used in this Act—

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term “unfair labor practice” means any unfair labor practice listed in section 8.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when

made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . .

Section 10.(a) The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(e) The Board shall have power to petition any circuit court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the

order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceedings, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter

a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8(a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

No. 12845

cc
V. 2687

United States
Court of Appeals
for the Ninth Circuit.

THE STUART COMPANY, a Corporation,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.

THE STUART COMPANY, a Corporation,
Respondent.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 400)

FILED

MAY 7 1951

PAUL H. THOMAS

Petition to Review a Decision of the Tax Court
of the United States

No. 12845

United States
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THE STUART COMPANY, a Corporation,
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The Tax Court of the United States

Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

DOCKET ENTRIES

1946

Nov. 12—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 18—Copy of petition served on General Counsel.

Dec. 31—Answer filed by General Counsel.

Dec. 31—Request for hearing at Los Angeles, California.

1947

Jan. 3—Notice issued placing proceeding on Los Angeles, Calif., calendar.

Service of answer and request made.

Dec. 8—Hearing set 1/26/48—Los Angeles, California.

1948

Jan. 28,

29, 30,

& 31—Hearing had before Judge Harron on merits. Motion of petitioner to amend petition—Granted. Amended answer filed by respondent. Appearance of Robert H. Dunlap, as counsel, filed. Petitioner's brief 3/16/48.

Respondent's brief 4/16/48. Petitioner's reply brief 5/17/48.

Feb. 20—Transcript of hearing 1/28/48 filed.

Feb. 20—Transcript of hearing 1/29/48 filed.

Feb. 20—Transcript of hearing 1/30/48 filed.

Feb. 26—Transcript of hearing 1/31/48 filed.

Mar. 10—Answer to amendment to petition filed by General Counsel. 3/11/48 Served.

Mar. 16—Brief filed by taxpayer. 3/17/48 Copy served.

Apr. 16—Reply brief filed by General Counsel.

May 5—Motion to correct error in respondent's reply brief, filed by General Counsel. 5/5/48 Granted.

May 17—Reply brief filed by taxpayer. 5/18/48 Copy served.

1950

June 30—Memorandum findings of fact and opinion rendered, Judge Harron.

Decision will be entered under rule 50. Copy served.

1950

Aug. 22—Respondent's computation filed.

Aug. 25—Hearing set 9/27/50 on settlement.

Sept. 21—Consent to respondent's computation filed.

Sept. 22—Decision entered. Judge Harron. Div. 13.

Dec. 21—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by taxpayer.

Dec. 22—Proof of service filed.

Dec. 21—Designation of contents of record on review filed by taxpayer with proof of service acknowledged thereon as of 12/22/50.

Dec. 21—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by General Counsel.

Dec. 28—Proof of service of petition for review sent to taxpayer filed.

Dec. 28—Proof of service of petition for review sent to counsel for taxpayer filed.

1951

Jan. 8—Statement of points filed by General Counsel with statement of service by mail thereon.

Jan. 8—Statement of Non-Diminution of Record filed by General Counsel with statement of service thereon.

1951

Jan. 15—Statement of points and designation of parts of the record to be printed filed by taxpayer with acknowledgment of service thereon.

Jan. 15—Further designation of contents of record on review filed by taxpayer with acknowledgment of service thereon.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:IT:90D:PAK), dated August 16, 1946, and as a basis of this proceeding alleges as follows:

1. The petitioner is a corporation with its principal office at 234 East Colorado Street, Pasadena 1, California. The returns for the periods here involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or about August 16, 1946.

3. The taxes in controversy are income taxes, declared value excess-profits taxes and excess-profits taxes for the following years and in the following amounts:

Year Ended	Income Taxes	Declared Value	Excess-Profits Taxes
		Excess-Profits Taxes	
March 31, 1943.....	\$1,733.81	\$ 263.70	\$ 8,495.95
March 31, 1944.....	—	—	52,808.66
March 31, 1945.....	287.13	6,591.80	67,286.82

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in disallowing as deductions for the taxable years ended March 31, 1943; March 31, 1944, and March 31, 1945, royalties paid in the respective amounts of \$17,485.32, \$57,-189.47 and \$94,637.96.

(b) The respondent erred in determining that said royalty payments were capital expenditures.

(c) If the Court should find that the above-referred to payments are not in the nature of royalties, then the respondent erred in disallowing said payments as deductions in the years indicated for the reason that said payments were made solely for the cancellation of an onerous contract.

(d) The respondent erred in disallowing as a deduction for the taxable year ended March 31, 1943, the entire lump sum payment made during that year of \$35,000.00 under the agreement of cancellation of the above-referred-to contract.

(e) The respondent erred in failing to allow as a deduction from income the sum of \$2,023.81, interest paid by petitioner during the taxable year ended March 31, 1943.

(f) The respondent erred in failing to allow as

a deduction from income for the taxable year ended March 31, 1943, the sum of \$5,286.83 as a net operating loss carryover.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California. Petitioner is now and since the date of its incorporation on or about March 27, 1941, has been engaged in the sale and distribution of vitamin food concentrates, with its principal office at 234 East Colorado Street, Pasadena 1, California.

(b) On or about May 5, 1941, petitioner, The Vita-Food Corporation and Shaler Food Products Company entered into an agreement under the terms of which The Vita-Food Corporation was to manufacture and petitioner was to sell and distribute certain vitamin food concentrates to be known as "The Stuart Formula."

(c) Operations under the above-referred-to contract were never satisfactory or profitable to the petitioner for many reasons. Chiefly, the pricing arrangement did not permit petitioner to make a profit and the product which The Vita-Food Corporation supplied was inferior and undependable in quality. As a result, disputes arose and on or about November 28, 1942, petitioner and The Vita-Food Corporation entered into Agreement of Settlement of Litigation and Cancellation of Contract.

(d) Under the above-referred to agreement of

cancellation of contract, petitioner agreed to pay The Vita-Food Corporation, and did pay as indicated upon its returns for the years here in question, the sums of \$35,000.00 upon execution of the agreement, \$40,000.00 at the rate of \$4,000.00 per month and \$122,700.00, payable as royalties based upon units of vitamin concentrates sold.

(e) Petitioner did not make any part of said payments for the purpose of acquiring a capital asset, but did make all of said payments as royalties and/or for the cancellation of an onerous contract. Notwithstanding this fact, the respondent has erroneously and illegally determined that all of said payments were capital expenditures made for the acquisition of a capital asset.

(f) Petitioner is informed and believes and upon such information and belief alleges that if it was not at all times the owner of the trade name "The Stuart Formula," that registration of such trade-mark was cancellable upon petition to the United States Patent Office by petitioner. Notwithstanding this fact, the respondent has erroneously and illegally determined that the above-referred-to payments were made for the purpose of acquiring exclusive right to the use of said trade name.

(g) Petitioner is informed and believes, and upon such information and belief alleges, that the name "The Stuart Formula" was without value at the time the above-referred-to agreement of cancellation of contract was entered into. Notwithstanding

this fact, the respondent has erroneously and illegally determined that all the payments made by petitioner under said agreement of cancellation of contract were made for the purpose of acquiring exclusive right to the use of said trade name.

(h) Under dates of September 12, 1942; September 23, 1942, and September 30, 1942, petitioner made payments of interest totaling \$2,023.81 upon notes of Shaler Food Products Company, which petitioner assumed as a result of a merger between petitioner and the Shaler Food Products Company on or about July 3, 1942. Notwithstanding this fact, the respondent has erroneously and illegally failed to allow said interest payments as a deduction for the taxable year ended March 31, 1943.

(i) As a result of and in connection with the above-referred-to merger of the Shalter Food Products Company and petitioner, petitioner became entitled to the net operating loss of the Shaler Food Products Company in the amount of \$5,286.83. Notwithstanding this fact, the respondent has erroneously and illegally failed to allow said net operating loss as a deduction for the taxable year ended March 31, 1943, in accordance with the provisions of Section 122 of the Internal Revenue Code.

Wherefore, petitioner prays that The Tax Court of the United States hear this proceeding and redetermine the aforesaid deficiency, in accordance with the rights of the petitioners in the premises; that overpayment be determined by reason of additional deductions allowable as alleged herein, the amount of which may be determined under Rule 50;

and grant such other and further relief, including refunds, as to it may seem just and proper.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ F. EDWARD LITTLE,
Counsel for Petitioner.

Of Counsel:

/s/ ROBERT H. DUNLAP.

State of California,
County of Los Angeles—ss.

Arthur Hanisch and Ludwig Lauerhass, being duly sworn, depose and say: That they are President and Assistant Treasurer, respectively, of The Stuart Company, the petitioner named in the foregoing Petition; that they are duly authorized to verify the same; that they have read the said Petition and know the contents thereof; that the same is true of their own knowledge, except as to these matters which are therein stated on information or belief, and as to those matters they believe it to be true.

/s/ ARTHUR HANISCH,
/s/ LUDWIG LAUERHASS.

Subscribed and sworn to before me this 7th day of November, 1946.

[Seal] /s/ MARJORIE M. McADAM,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Aug. 18, 1947.

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

August 16, 1946

Office of
Internal Revenue Agent
in Charge
Los Angeles Division
LA:IT:90D:PAK
The Stuart Company
234 East Colorado Street
Pasadena 1, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended March 31, 1943, 1944 and 1945, discloses a deficiency of \$2,020.94 for the taxable years ended March 31, 1943, and March 31, 1945, and an overassessment of \$142.15 for the taxable year ended March 31, 1944, and that the determination of your declared value excess-profits tax liability for the taxable years ended March 31, 1943, and 1945, discloses a deficiency of \$6,855.50, and that the determination of your excess profits tax liability for the taxable years ended March 31, 1943, 1944 and 1945, discloses a deficiency of \$128,591.43, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver

Form 843

Statement

LA:IT:90D:PAK

The Stuart Company
234 East Colorado Street
Pasadena 1, California

Tax Liability for the Taxable Years
Ended March 31, 1943, to 1945, Inclusive
Income Tax

Year Ended	Liability	Assessed	Over-assessment	Deficiency
March 31, 1943.....	\$ 1,733.81	\$ 0.00	—	\$ 1,733.81
March 31, 1944.....	1,847.66	1,989.81	\$142.15	—
March 31, 1945.....	2,859.52	2,572.39	—	287.13
Totals.....	\$ 6,440.99	\$4,562.20	\$142.15	\$ 2,020.94
Declared Value Excess-Profits Tax				
March 31, 1943.....	\$ 263.70	\$ 0.00	—	\$ 263.70
March 31, 1945.....	6,591.80	0.00	—	6,591.80
Totals.....	\$ 6,855.50	\$ 0.00		\$ 6,855.50
Excess-Profits Tax				
March 31, 1943.....	\$ 8,495.95	\$ 0.00	—	\$ 8,495.95
March 31, 1944.....	52,808.66	0.00	—	52,808.66
March 31, 1945.....	73,635.63	6,348.81	—	67,286.82
Totals.....	\$134,940.24	\$6,348.81		\$128,591.43

In making this determination of your tax liability careful consideration has been given to the reports of examination dated November 16, 1945, and June 5, 1946.

In your returns for the taxable years ended March 31, 1943, March 31, 1944, and March 31, 1945, there are claimed deductions for royalties in the respective amounts of \$17,485.32, \$57,189.47 and \$94,637.96. The claimed deductions are disallowed because they represent capital expenditures.

For the taxable year ended March 31, 1943, and prior taxable years you claimed deductions for bad debts on the basis of specific bad debts. For the taxable years ended March 31, 1944, and March 31, 1945, you claimed deductions for additions to reserve for bad debts. Since you did not secure permission from the Commissioner to change the method of accounting for bad debts for the taxable years ended March 31, 1944, and March 31, 1945, the deductions claimed for addition to reserve for bad debts for those years are disallowed and, in lieu thereof, deductions are allowed for debts which became worthless and were charged to the reserve for bad debts.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect

to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

ADJUSTMENT TO NET INCOME

Taxable Year Ended March 31, 1943

Net income as disclosed by return (loss).....	\$(962.80)
Unallowable deduction:	
(a) Deduction for royalties disallowed.....	17,458.32
Net income adjusted.....	\$16,495.52

EXPLANATION OF ADJUSTMENT

(a) This adjustment has been previously explained.

COMPUTATION OF DECLARED VALUE EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1943

Net income adjusted.....	\$16,495.52
Less: 10% of \$125,000.00 value of capital stock as declared in capital stock tax return for the year ended June 30, 1942.....	12,500.00
Net income subject to declared value excess-profits tax.....	\$ 3,995.52
Declared value excess-profits tax:	
6.6% of \$3,995.52.....	\$ 263.70
Correct declared value excess profits tax liability.....	\$ 263.70
Declared value excess-profits tax assessed:	
Original, account No. N.C. 16249.....	\$ 0.00
Deficiency of declared value excess-profits tax.....	\$ 263.70

Excess-Profits Net Income

Taxable Year Ended March 31, 1943

Inasmuch as you did not file a corporation excess-profits tax return for this taxable year your excess profits net income has been determined as follows:

Net income adjusted.....	\$16,495.52
Addition:	
(a) 50% of interest on borrowed capital \$3,177.21	
(b) Adjustment of net operating loss deduction.....	1,496.71
Total.....	\$21,169.44
Reduction:	
(c) Declared value excess-profits tax.....	263.70
Excess-profits net income determined.....	\$20,905.74

EXPLANATION OF ADJUSTMENTS

(a) The deduction claimed for interest is reduced by 50% of the interest on borrowed capital, in accordance with section 711 (a) (2) (B) of the Internal Revenue Code.

(b) The net operating loss deduction of \$6,462.14, representing a net operating loss carryover from the taxable year ended March 31, 1942, and claimed as a deduction in computing net income on your return is decreased by \$1,496.71 representing 50% of interest on borrowed capital for that taxable year, in accordance with section 711 (a) (2) (1) of the Internal Revenue Code.

(c) A deduction is allowed for declared value excess-profits tax in the amount of \$263.70.

INVESTED CAPITAL

Taxable Year Ended March 31, 1943

Since no corporation excess-profits tax return was filed for this year your invested capital is determined as shown in the following:

(a) Equity invested capital.....	\$ 2,188.35
(b) Average borrowed invested capital.....	42,737.27

Invested capital determined.....	\$44,925.62
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(a) The amount of equity invested capital \$2,188.35, is determined as shown in the following:

Money paid in for stock.....	\$ 1,000.00
Property paid in for stock during year.....	\$1,000.00
Average daily amount (\$1,000.00x274/365).....	750.68

Total.....	\$ 1,750.68
25% of new capital.....	437.67

Equity invested capital determined.....	\$ 2,188.35
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(b) It has been determined that you had average borrowed capital of \$85,474.53 for this year, of which 50 per centum, or \$42,737.27, is includible in invested capital in accordance with section 719 (b) of the Internal Revenue Code.

COMPUTATION OF UNUSED EXCESS-PROFITS CREDIT CARRYOVER

Taxable Year Ended March 31, 1943

It has been determined that you had an unused excess-profits credit carryover from the taxable year ended March 31, 1942, of \$2,871.75 as shown in the following:

Money paid in for stock.....	\$ 975.34
25% of new capital.....	243.84
Average borrowed invested capital.....	34,677.68

Invested capital.....	\$35,896.86
Excess-profits credit (8% of \$35,896.86).....	\$ 2,871.75
Excess-profits net income.....	0.00

Unused excess-profits credit.....	\$ 2,871.75
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COMPUTATION OF EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1943

Excess-profits net income.....		\$20,905.74
Less: Specific exemption	\$5,000.00	
Excess-profits credit		
(8% of \$44,925.62 invested capital)....	3,594.05	
Unused excess-profits credit carryover....	2,871.75	11,465.80
Adjusted excess-profits net income.....		\$ 9,439.94
Excess-profits tax:		
90% of \$9,439.94.....		\$ 8,495.95
(Limitation under section 710(a) (1) (B)		
not applicable)		
Correct excess-profits tax liability.....		\$ 8,495.95
Excess-profits tax assessed (no return filed).....		0.00
Deficiency of excess-profits tax.....		\$ 8,495.95

COMPUTATION OF INCOME TAX

Taxable Year Ended March 31, 1943

Net income adjusted.....		\$16,495.52
Less: Income subject to excess-profits tax.....	\$9,439.94	
Declared value excess-profits tax.....	263.70	9,703.64
Normal-tax net income.....		\$ 6,791.88
Surtax net income.....		\$ 6,791.88
Income tax:		
Normal tax:		
15% of \$5,000.00.....	\$ 750.00	
17% of \$1,791.88.....	304.62	\$ 1,054.62
Surtax:		
10% of \$6,791.88.....		679.19
Correct income tax liability.....		\$ 1,733.81
Income tax assessed:		
Original, Account No. NC 16249.....		None
Deficiency of income tax.....		\$ 1,733.81

ADJUSTMENTS TO NET INCOME

Taxable Year Ended March 31, 1944

Net income as disclosed by return.....		\$ 7,740.04
Unallowable deductions and additional income:		
(a) Deduction for royalties disallowed....	\$57,189.47	
(b) Addition to reserve for bad debts disallowed.....	1,507.14	
(c) Net operating loss deduction disallowed.....	962.80	
(d) Recoveries on bad debts credited to reserve.....	1,598.23	\$61,257.64
Total		\$68,997.68
Additional deduction:		
(e) Bad debts charged off.....		677.28
Net income adjusted.....		\$68,320.40

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) and (e) As previously stated you did not secure permission from the Commissioner to change from the specific charge-off method of accounting for bad debts to the reserve basis. Accordingly, the addition to reserve for bad debts claimed in your return in the amount of \$1,507.14 is disallowed and, in lieu thereof, a deduction is allowed in the amount of \$677.28 representing debts which became worthless in the taxable year and were charged off.

(c) The net operating loss deduction of \$962.80, representing a net operating loss carryover from the taxable year ended March 31, 1943, is disallowed because it has been determined that you had a net income, instead of a loss, for that year.

(d) Recoveries on bad debts charged off prior to this taxable year, in the amount of \$1,598.23 were credited to reserve for bad debts in your return. Such amount is here added to your income.

ADJUSTMENTS TO EXCESS-PROFITS NET INCOME

Taxable Year Ended March 31, 1944

Excess profits net income as disclosed by return.....		\$10,471.80
Additional income and unallowable deductions:		
(a) Deduction for royalties disallowed....	\$57,189.47	
(b) Addition to reserve for bad debts disallowed.....	1,507.14	
(c) Net operating loss deduction disallowed.....	962.80	
(d) Recoveries on bad debts credited to reserve	1,598.23	\$61,257.64
Total		\$71,729.44
Additional deduction:		
(e) Bad debts charged off.....		677.28
Excess profits net income adjusted.....		\$71,052.16
(a), (b), (c), (d) and (e) These adjustments are the same as made to net income and previously explained.		

ADJUSTMENTS TO INVESTED CAPITAL

Taxable Year Ended March 31, 1944

Invested capital as disclosed by return.....	\$45,776.80
Additions:	
(a) 25 per cent of increase of new capital.....	500.00
Invested capital adjusted.....	\$46,276.80

EXPLANATION OF ADJUSTMENTS

(a) There is added to the invested capital shown by your return the amount of \$500.00 representing 25 per cent of new capital paid in during a taxable year beginning after December 31, 1940, not previously claimed by you in accordance with section 718 (a) (6) of the Internal Revenue Code.

COMPUTATION OF EXCESS-PROFITS CREDIT

Taxable Year Ended March 31, 1944

Invested capital adjusted.....	\$46,276.80
Excess-profits credit (8% of \$46,276.80).....	3,702.14

COMPUTATION OF EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1944

Tentative tax under section 710(a) (6) (A) Internal Revenue Code

Excess-profits net income.....	\$71,052.16
Less: Specific exemption	\$5,000.00
Excess-profits credit.....	3,702.14
	8,702.14

Adjusted excess-profits net income.....	\$62,350.02
(a) 90% of \$62,350.02.....	56,115.02

Surtax net income computed without reference to the credit provided in section 26(e).....	\$68,320.40
80% of \$68,320.40.....	\$54,656.32
Less: Income tax (as below).....	1,512.00

(b) Balance	\$53,144.32
Tentative tax under section 710(a) (6) (A) (lesser of items (a) and (b)).....	\$53,144.32

Tentative tax under section 710(a) (6) (B) I.R.C.

Excess-profits net income.....	\$71,052.16
Less: Specific exemption	\$10,000.00
Excess-profits credit.....	3,702.14
	13,702.14

Adjusted excess-profits net income.....	\$57,350.02
(a) 95% of \$57,350.02.....	\$54,482.52

Surtax net income computed without reference to the credit provided in section 26(e).....	\$68,320.40
80% of \$68,320.40.....	\$54,656.32
Less: Income tax (as below).....	2,862.00

(b) Balance	\$51,794.32
Tentative tax under section 710 (a) (6) (B) (lesser of items (a) and (b)).....	\$51,794.32

Excess-profits tax under section 710(a) (6) I.R.C.

1. Tentative tax under section 710(a)(6)(A).....	\$53,144.32
2. Tentative tax under section 710(a)(6)(B).....	\$51,794.32
3. Number of days in taxable year.....	366
4. Number of days before January 1, 1944.....	275
5. Number of days after December 31, 1943.....	91
6. Portion of item 1 which item 4 bears to item 3 (275/366x\$53,144.32)	\$39,930.84
7. Portion of item 2 which item 5 bears to item 3 (91/366x\$51,794.32)	12,877.82
Correct excess-profits tax liability (sum of items 6 and 7).....	\$52,808.66
Excess-profits tax assessed: Original, Account No. NC 801485.....	0.00
Deficiency of excess-profits tax.....	\$52,808.66

COMPUTATION OF INCOME TAX

Taxable Year Ended March 31, 1944

Tentative tax under section 108(b)(1)(A) I.R.C.

Net income	\$68,320.40
Less: Income subject to excess-profits tax.....	62,350.02
Normal-tax net income.....	\$ 5,970.38
Surtax net income.....	\$ 5,970.38
Income tax:	
Normal tax:	
15% of \$5,000.00.....	\$750.00
17% of \$ 976.16.....	164.96
	\$ 914.96
Surtax:	
10% of \$5,970.38.....	\$ 597.04

Tentative tax under section 108(b)(1)(A).....	\$ 1,512.00
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Tentative tax under section 108(b)(1)(B) I.R.C.

Net income	\$68,320.40
Less: Income subject to excess-profits tax.....	57,350.02
Normal-tax net income.....	\$10,970.38
Surtax net income.....	10,970.38
Income tax:	
Normal tax:	
15% of \$5,000.00.....	\$ 750.00
17% of \$5,970.38.....	1,014.96
	\$ 1,764.96
Surtax:	
10% of \$10,970.38.....	1,097.04

Tentative tax under section 108(b)(1)(B).....	\$ 2,862.00
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Income tax under section 108(b)(1) I.R.C.

1. Tentative tax under section 108(b)(1)(A).....	\$ 1,512.00
2. Tentative tax under section 108(b)(1)(B).....	2,862.00
3. Number of days in taxable year.....	366
4. Number of days before January 1, 1944.....	275
5. Number of days after December 31, 1943.....	91
6. Portion of item 1 which item 4 bears to item 3 (275/366x\$1,512.00)	\$ 1,136.07
7. Portion of item 2 which item 5 bears to item 3 (91/366x\$2,862.00)	711.59
Correct income tax liability (sum of items 6 and 7).....	\$ 1,847.66
Income tax assessed:	
Original, Account No. Aug. 410040.....	1,989.81
Overassessment of income tax.....	\$ 142.15

ADJUSTMENTS TO NET INCOME

Taxable Year Ended March 31, 1945

Net income as disclosed by return.....	\$ 17,323.25
Additional income and unallowable deductions:	
(a) Deduction for royalties disallowed \$94,637.96	
(b) Recoveries of bad debts..... 476.70	95,114.66
Net income adjusted.....	\$112,437.91

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) During the taxable year you credited recoveries of bad debts in the amount of \$476.70 to the reserve for bad debts, and charged the reserve for bad debts with the amount of \$677.28 representing worthless debts. It has been determined that the amount of bad debts charged to the reserve \$677.28, is properly allowable for the taxable year ended March 31, 1944, and has been allowed for that taxable year. The amount of recoveries on bad debts, previously charged off, made during this taxable year, \$476.70 is added to income.

COMPUTATION OF DECLARED VALUE EXCESS PROFITS TAX

Taxable Year Ended March 31, 1945

Net income adjusted.....	\$112,437.91
Less: 10% of \$500,000.00 value of capital stock as declared in capital stock tax return for the year ended June 30, 1944.....	50,000.00
Net income subject to declared value excess-profits tax....	62,437.91
Less: Amount taxable @ 6.5% (5% of \$500,000.00).....	25,000.00

Balance taxable at 13.2%.....	\$ 37,437.91
Declared value excess-profits tax:	
6.6% of \$25,000.00.....	\$1,650.00
13.2% of \$37,437.91.....	4,941.80
	<hr/>
Correct declared value excess-profits tax liability.....	6,591.80
Declared value excess-profits tax assessed:	
Original, Account No. July 410048.....	None
	<hr/>
Deficiency of declared value excess-profits tax.....	\$ 6,591.80

ADJUSTMENTS TO EXCESS-PROFITS NET INCOME

Taxable Year Ended March 31, 1945

Excess-profits net income as disclosed by return.....	\$ 21,782.58
Additional income and unallowable deductions:	
(a) Deduction for royalties disallowed	\$94,637.96
(b) Recoveries on bad debts.....	476.70
	<hr/>
Total	\$116,897.24
Additional deduction:	
(c) Declared value excess-profits tax.....	6,591.80
	<hr/>
Excess-profits net income adjusted.....	\$110,305.44

EXPLANATION OF ADJUSTMENTS

(a) and (b) These adjustments are the same as made to net income and previously explained.

(c) A deduction is allowed for declared value excess-profits tax, not previously claimed by you, in the amount of \$6,591.80.

ADJUSTMENTS TO INVESTED CAPITAL

Taxable Year Ended March 31, 1945

Invested capital as disclosed by return.....	\$54,463.20
Additions:	
(a) Accumulated earnings and profits	
at beginning of taxable year.....	\$12,793.30
(b) 25 per cent increase of new capital	500.00
	<hr/>
Invested capital adjusted.....	\$67,756.50

EXPLANATION OF ADJUSTMENTS

(a) In your return you did not include in invested capital any amount of accumulated earnings and profits at the beginning of the taxable year. It has been determined that you had accumulated earnings and profits at the beginning of the taxable year in the amount of \$12,793.30.

(b) There is added to the invested capital shown by your return the amount of \$500.00 representing 25% increase of new capital paid in during a taxable year beginning after December 31, 1940, not previously claimed by you, in accordance with section 718(a)(6) of the Internal Revenue Code.

COMPUTATION OF EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1945

Excess-profits net income.....		\$110,305.44
Less: Specific exemption	\$10,000.00	
Excess-profits credit (8% of \$67,756.50 invested capital)	5,420.52	15,420.52
Adjusted excess-profits net income.....		\$ 94,884.92
Excess-profits tax:		
(a) 95% of \$94,884.92.....		\$ 90,140.67
Surtax net income computed without reference to the credit provided in section 26(e).....		\$105,846.11
80% of \$105,846.11.....		84,676.89
Less: Income tax (as below).....		2,859.52
(b) Balance		\$ 81,817.37
Total excess-profits tax (lesser of items (a) and (b)).....		\$ 81,817.37
Less: Credit allowable—Section 784 I.R.C.....		8,181.74
Correct excess-profits tax liability.....		\$ 73,635.63
Excess-profits tax assessed:		
Original, Account No. July 400019.....	\$7,054.23	
Less: Credit allowed—Section 784.....	705.42	6,348.81
Deficiency of excess-profits tax.....		\$ 67,286.82

COMPUTATION OF INCOME TAX

Taxable Year Ended March 31, 1945

Net income adjusted.....		\$112,437.91
Less: Income subject to excess-profits tax....	\$94,884.92	
Declared value excess-profits tax.....	6,591.80	\$101,476.72
Normal-tax net income.....		\$ 10,961.19
Surtax net income.....		\$ 10,961.19
Income tax:		
Normal tax:		
15% of \$5,000.00.....	\$ 750.00	
17% of \$5,961.19.....	1,013.40	1,763.40
Surtax		
10% of \$10,961.19.....		1,096.12
Correct income tax liability.....		\$ 2,859.52
Income tax assessed:		
Original, Account No. July 410048.....		2,572.39
Deficiency of income tax.....		\$ 287.13

Received and Filed T.C.U.S. November 12, 1946.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. & 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes and declared value excess-profits taxes for the taxable years ended March 31, 1943, and 1945; and excess-profits taxes for the taxable years ended March 31, 1943, 1944 and 1945; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. (a) through (f). Denies all of the allegations contained in subparagraphs (a) to (f) inclusive, of paragraph 4 of the petition.

5 (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (i) inclusive. Denies the allegations contained in subparagraphs (b) to (i) inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in

the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHELL, ECC
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
Special Attorney,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. December 31, 1946.

[Title of Tax Court and Cause.]

AMENDED PETITION

The petition in the above-entitled proceeding is hereby amended to read as follows:

“The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:IT:90D:PAK), dated August 16, 1946, and as a basis of this proceeding alleges as follows:

“1. The petitioner is a corporation with its principal office at 234 East Colorado Street, Pasadena 1, California. The returns for the periods here in-

volved were filed with the Collector of Internal Revenue for the Sixth District of California.

“2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or about August 16, 1946.

“3. The taxes in controversy are income taxes, declared value excess-profits taxes and excess-profits taxes for the following years and in the following amounts:

Year Ended	Income Taxes	Declared Value Excess-Profits Taxes	Excess-Profits Taxes
March 31, 1943.....	\$1,733.81	\$ 263.70	\$ 8,495.95
March 31, 1944.....	—	—	\$52,808.66
March 31, 1945.....	\$ 287.13	\$6,591.80	\$67,286.82

“4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in disallowing as deductions for the taxable years ended March 31, 1943, March 31, 1944, and March 31, 1945, royalties paid in the respective amounts of \$17,485.32, \$57,189.47 and \$94,637.96.

(b) The respondent erred in determining that said royalty payments were capital expenditures.

(c) If the Court should find that the above referred to payments are not in the nature of royalties, then the respondent erred in disallowing said payments as deductions in the years indicated for the reason that said payments were made solely for the cancellation of an onerous contract.

(d) The respondent erred in disallowing as a deduction for the taxable year ended March 31, 1943,

the entire lump sum payment made during that year of \$35,000.00 under the agreement of cancellation of the above-referred-to contract.

(e) The respondent erred in failing to allow as a deduction from income the sum of \$2,023.81, interest paid by petitioner during the taxable year ended March 31, 1943.

(f) The respondent erred in failing to allow as a part of petitioner's invested capital for the fiscal years ending March 31, 1944, and March 31, 1945, the amount of the post-war refund credit determined for the previous two years.

(g) The respondent erred in failing to allow as a credit to the excess-profits tax determined for the fiscal years ending March 31, 1943, and March 31, 1944, the post-war refund credit of excess-profits tax as provided in Sections 780 and 781 of the Internal Revenue Code.

"5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California. Petitioner is now and since the date of its incorporation on or about March 27, 1941, has been engaged in the sale and distribution of vitamin food concentrates, with its principal office at 234 East Colorado Street, Pasadena 1, California.

(b) On or about May 5, 1941, petitioner, The Vita-Food Corporation and Shaler Food Products Company entered into an agreement under the terms of which The Vita-Food Corporation was to

manufacture and petitioner was to sell and distribute certain vitamin food concentrates to be known as "The Stuart Formula."

(c) Operations under the above-referred-to contract were never satisfactory or profitable to the petitioner for many reasons. Chiefly, the pricing arrangement did not permit petitioner to make a profit, and the product which The Vita-Food Corporation supplied was inferior and undependable in quality. As a result, disputes arose and on or about November 28, 1942, petitioner and The Vita-Food Corporation entered in Agreement of Settlement of Litigation and Cancellation of Contract.

(d) Under the above-referred-to agreement of cancellation of contract, petitioner agreed to pay The Vita-Food Corporation, and did pay as indicated upon its returns for the years here in question, the sums of \$35,000.00 upon execution of the agreement, \$40,000.00 at the rate of \$4,000.00 per month, and \$122,700.00, payable as royalties based upon units of vitamin concentrates sold.

(e) Petitioner did not make any part of said payments for the purpose of acquiring a capital asset, but did make all of said payments as royalties and/or for the cancellation of an onerous contract. Notwithstanding this fact, the respondent has erroneously and illegally determined that all of said payments were capital expenditures made for the acquisition of a capital asset.

(f) Petitioner is informed and believes and upon such information and belief alleges that if it

was not at all times the owner of the trade name "The Stuart Formula," that registration of such trade-mark was cancellable upon petition to the United States Patent Office by petitioner. Notwithstanding this fact, the respondent has erroneously and illegally determined that the above-referred-to payments were made for the purpose of acquiring exclusive rights to the use of said trade name.

(g) Petitioner is informed and believes, and upon such information and belief alleges, that the name "The Stuart Formula" was without value at the time of the above-referred-to agreement of cancellation of contract was entered into. Notwithstanding this fact, the respondent has erroneously and illegally determined that all the payments made by petitioner under said agreement of cancellation of contract were made for the purpose of acquiring exclusive right to the use of said trade name.

(h) Under dates of September 12, 1942; September 23, 1942, and September 30, 1942, petitioner made payments of interest totaling \$2,023.81 upon notes of Shaler Food Products Company, which petitioner assumed as a result of a merger between petitioner and the Shaler Food Products Company on or about July 3, 1942. Notwithstanding this fact, the respondent has erroneously and illegally failed to allow said interest payments as a deduction for the taxable year ended March 31, 1943.

(i) Petitioner keeps its books and accounts and files its return on the accrual basis of accounting.

In the notice of deficiency, the respondent has determined excess-profits taxes for the fiscal year ending of March 31, 1943, of \$8,495.95 and for the fiscal year ending March 31, 1944, of \$52,808.66. The post-war credit for the two years indicated would be \$849.60 and \$5,280.87, respectively, which would constitute earnings and profits at the beginning of the respective years and a part of the invested capital of petitioner. Notwithstanding the above facts, the respondent has failed and neglected to allow any of the above sums in either of the fiscal years ending March 31, 1944, and March 31, 1945, contrary to the provisions of Section 718 of the Internal Revenue Code.

(j) For the fiscal year ending March 31, 1943, petitioner showed no excess-profits tax on its excess-profits tax return, Treasury Form 1121. The respondent's notice of determination shows a deficiency of excess-profits tax liability of \$8,495.95, but fails to show any post-war refund credit, as provided by Sections 780, 781 and 784 of the Internal Revenue Code. By reason of this fact, the respondent has overstated the deficiency for said year in the sum of \$849.60.

For the fiscal year ending March 31, 1944, petitioner showed no excess-profits tax on its return, Treasury Form 1121. The respondent's notice of determination shows an excess-profits tax liability of \$52,808.66, but fails to show any post-war refund credit, as provided by Sections 780, 781 and 784 of the Internal Revenue Code. By reason of this fact, respondent has overstated the deficiency for said year in the sum of at least \$5,280.87.

“Wherefore, petitioner prays that The Tax Court of the United States hear this proceeding and re-determine the aforesaid taxes in accordance with the rights of the petitioner in the premises; that overpayment be determined for the various years indicated by reason of the additional deductions, post-war refund credits, additions to invested capital, and other adjustments as alleged herein, the amount of which may be determined under Rule 50; and grant such other and further relief, including refunds, as to it may seem just and proper in the premises.”

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ F. EDWARD LITTLE,

Counsel for Petitioner.

Of Counsel:

/s/ ROBERT H. DUNLAP.

State of California,
County of Los Angeles—ss.

Arthur Hanisch, being duly sworn, deposes and says: That he is the president of the Stuart Company, the petitioner named in the foregoing Amended Petition; that he is duly authorized to verify the same; that he has read the said amended petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on informa-

tion or belief, and as to those matters he believes it to be true.

/s/ ARTHUR HANISCH.

Subscribed and sworn to before me this 20th day of January, 1948.

[Seal] /s/ DOROTHY ERBEN,

Notary Public in and for the Said County and State.

My Commission Expires Sept. 28, 1951.

Filed at Hearing, January 28, 1948.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits that the taxes in controversy are income taxes and declared value excess profits taxes for the taxable years ended March 31, 1943, and 1945, and excess profits taxes for the taxable years ended March 31, 1943, 1944 and 1945; but denies the remainder of the allegations contained in paragraph 3 of the amended petition.

4 (a) to (g) inclusive. Denies all of the allegations of error alleged in subparagraphs (a) to (g) inclusive of paragraph 4 of the amended petition.

5 (a). Admits the allegations contained in sub-

paragraph (a) of paragraph 5 of the amended petition;

(b). Admits that the petitioner, the Vita-Food Corporation and the Shaler Food Products Company entered into an agreement dated May 5, 1941, under the terms of which the Vita-Food Corporation was to manufacture and sell to petitioner for sale and distribution, said vitamin food concentrates to be known as the "The Stuart Formula," as alleged in subparagraph (b) of paragraph 5 of the amended petition;

(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the amended petition, except that respondent admits that on or about November 28, 1942, the petitioner and the Vita-Food Corporation entered into an agreement entitled "Agreement of Settlement of Litigation and Cancellation of Contract."

(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the amended petition except that respondent admits that under the agreement referred to, the petitioner agreed to pay the Vita-Food Corporation the sums of \$35,000.00 upon execution of the agreement, \$40,000.00 at the rate of \$4,000.00 per month and a balance of \$122,700.00, but denies the remainder of the allegations contained in said subparagraph.

(e) to (h) inclusive. Denies the allegations contained in subparagraphs (e) to (h) inclusive in paragraph 5 of the amended petition.

(i). Admits the allegations contained in the first two sentences of subparagraph (i) of paragraph 5

of the amended petition; denies the allegations contained in the third sentence of subparagraph (i) of paragraph 5 of the amended petition; and denies that respondent acted contrary to the provisions of Section 718 of the Internal Revenue Code in failing to include in the computation of petitioner's invested capital, for the taxable years ended March 31, 1943, and 1944, a post-war credit.

(j). Admits the allegations contained in subparagraph (j), and all subdivisions thereof, of paragraph 5 of the amended petition, except that respondent denies that the deficiencies in excess profits taxes determined to be due from the petitioner for the fiscal years ended March 31, 1943, and 1944, have been, or are, overstated in the amounts of \$849.60 and \$5,280.87, respectively, or in any other amounts.

6. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

R. E. MAIDEN,

Special Attorneys,

Bureau of Internal Revenue.

Filed at Hearing January 28, 1948.

[Title of Tax Court and Cause.]

SECOND AMENDMENT TO PETITION

The petition in the above-entitled proceeding is hereby amended as follows:

1. By adding to Paragraph 3 the following:

“; also in controversy are alleged overpayments of income taxes, declared value excess-profits taxes and excess-profits taxes in a yet undetermined amount.”

2. By adding to Paragraph 4 a new subparagraph as follows:

“(h) If the Court should find that the payments made under the agreement of November 28, 1942, by petitioner to Vita-Food Corporation were for the cancellation of an onerous contract and constitute ordinary and necessary expense and should be accrued as of the date of said agreement, then the respondent erred in failing to allow the loss sustained during the fiscal year ending March 31, 1943, as a net operating loss carryover for the fiscal years ended March 31, 1944, and March 31, 1945, within the purview of Section 122 of the Internal Revenue Code, and in failing to determine an overpayment of said taxes by reason thereof.”

3. By adding to Paragraph 5 two new subparagraphs as follows:

“(k) If the Court should find that the payments made as alleged under Paragraph 5 (d) of the petition under the cancellation agreement of November 28, 1942, to Vita-Food Corporation are accruable as an expense and all deductible in the fiscal year ended March 31, 1943, then and in that event the petitioner suffered a net operating loss within the purview of

Section 122 of the Internal Revenue Code which should be carried over to offset income for the fiscal years ended March 31, 1944, and March 31, 1945. In such event, petitioner has overpaid its taxes for each of the years ended March 31, 1944, and March 31, 1945, which should be refunded to petitioner.

“(1) All taxes in controversy which might give rise to the overpayment of tax were paid by petitioner within three years prior to the mailing by respondent of the notice of deficiency, which was mailed within three years after the returns were filed.”

3. By striking the prayer of the amended petition and inserting in lieu thereof the following:

“Wherefore, petitioner prays that the Tax Court of the United States hear this proceeding and re-determine the aforesaid taxes in accordance with the rights of the petitioner in the premises; that overpayment be determined for the various years indicated by reason of the additional deductions, post-war refund credits, additions to invested capital, net operating loss carryovers, and other adjustments as alleged herein, the amount of which may be determined under Rule 50; and grant such other and further relief, including refunds, as it may seem just and proper in the premises.”

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ F. EDWARD LITTLE,

Counsel for Petitioner.

Of counsel:

/s/ ROBERT H. DUNLAP.

State of California,
County of Los Angeles—ss.

Arthur Hanisch, being duly sworn, deposes and says: That he is the president of The Stuart Company, the petitioner named in the foregoing Amendment to Petition; that he is duly authorized to verify the same; that he has read the said amendment to petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

/s/ ARTHUR HANISCH.

Subscribed and sworn to before me this 31st day of January, 1948.

/s/ CLIFTON H. JACK,

Deputy Clerk, The Tax
Court of the U. S.

Filed at Hearing January 31, 1948.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amendment to the petition, denies as follows:

1, 2 and 3. Denies the material allegations con-

tained in paragraphs 1 to 3, inclusive, and all subdivisions thereof, of the amendment to the petition.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
R. E. MAIDEN, JR.,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed T.C.U.S. March 10, 1948.

Served Mar. 11, 1948.

The Tax Court of the United States
Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On the facts, held, that \$75,000 paid by the petitioner to secure the cancellation of an onerous contract is properly deductible during the fiscal year 1943 as an ordinary and necessary business expense, and that \$122,700 which the petitioner was obligated to pay for the purchase of a trade-mark is a capital expenditure which is not deductible as an ordinary and necessary business expense.

A. CALDER MACKAY, ESQ.,
ARTHUR MCGREGOR, ESQ.,
and

F. EDWARD LITTLE, ESQ.,
For the Petitioner.

R. E. MAIDEN, ESQ.,
For the Respondent.

MEMORANDUM FINDINGS OF FACT
AND OPINION

The Commissioner has determined deficiencies in the petitioner's income tax, declared-value excess profits tax, and excess profits tax for the fiscal years

ended March 31, 1943; March 31, 1944, and March 31, 1945, as follows:

Fiscal Year Ended	Income Tax	Declared-Value Excess-Profits Tax	Excess-Profits Tax
March 31, 1943.....	\$1,733.81	\$ 263.70	\$ 8,495.95
March 31, 1944.....	—	—	52,808.66
March 31, 1945.....	287.13	6,591.80	67,286.82

The issue in this proceeding is whether certain payments made by the petitioner during the years in question were made, either in part or in whole, to secure the cancellation of an onerous contract; or whether they were made, either in part or in whole, for the purchase of a trade-mark. The respondent contends that the entire payments were capital expenditures made to purchase a trade-mark and has asserted the above deficiencies. The petitioner contends that the entire payments were ordinary and necessary business expenses made to secure relief from an onerous contract and claims an overpayment in his taxes for the years in question.

The parties are in agreement on a number of other issues raised by the pleadings relative to adjustments in the petitioner's taxes for the years in question which are dependent upon the decision of the main issue in the proceeding.

The petitioner filed its returns for the years in question with the collector for the sixth district of California.

The record in this proceeding consists of oral testimony and various exhibits.

Findings of Fact

Sometime in the fall of 1940, Arthur Hanisch, who was the principal organizer and stockholder of The Stuart Company, which is the petitioner herein, decided to go into business in California. In December of 1940, Hanisch was introduced to Dr. Henry Borsook, who was a professor of biochemistry at the California Institute of Technology, and Maxwell H. Lewis, who was the vice-president of The Vita-Food Corporation (hereinafter referred to as "Vita-Food") which had been organized under the laws of California in November, 1940.

Dr. Borsook was interested in providing adequate vitamin concentrates to the greatest number of people at the lowest possible cost and had done a great deal of research in vitamins and in nutrition. He was a consultant to Vita-Food which manufactured and distributed locally at this time a vitamin concentrate which had been developed under the supervision of Dr. Borsook. Vita-Food was primarily interested in the manufacture of the vitamin concentrates and desired to associate itself with someone who would be willing to undertake national distribution of its vitamin products. Accordingly, on February 3, 1941, Hanisch entered into an informal agreement with Vita-Food which provided that Hanisch was to set up a sales and merchandising organization to distribute the vitamin concentrate produced by Vita-Food at stipulated retail prices. Hanisch agreed to purchase 3,000 gallons of the vitamin concentrate from Vita-Food and to market it under a trade name which would remain the property of Vita-Food.

On March 8, 1941, Hanisch entered into a subsequent informal agreement with Vita-Food under which he agreed to purchase an additional 3,000 gallons of the vitamin concentrate. This agreement also provided that:

We [Vita-Food] understand that you [Hanisch] are in process of forming two corporations, one to be named "The Shaler Food Products Company," which company will sell to food outlets, under the name "Vitaplex" the concentrate purchased by you under our said letter of February 3rd, upon condition that such outlets sell the same to consumers at a price not in excess of \$1.60 per 16 oz. bottle; and the other to be named "The Stuart Company," whose sales will be confined to drug stores and allied outlets [under the name "The Stuart Formula"] for resale at a price not in excess of \$1.85 per 16 oz. bottle.

We further understand it is your desire, and it is agreeable to us that, as soon as these corporations have been organized, separate written contracts will be entered into between them and ourselves embodying the applicable matters above set out as well as the conditions of future purchases and sale by them of said product in accordance with understandings had at our recent conferences.

By March 27, 1941, Hanisch had completed the organization of the two corporations; and The Stuart Company, which was named after Hanisch's younger son, was incorporated under the laws of

California on that date. This corporation, which is the petitioner herein, was organized to distribute the vitamin concentrate manufactured by Vita-Food under the trade name "The Stuart Formula" by making a personal approach to doctors and inducing them to recommend the product to their patients. "The Stuart Formula" was never advertised to the public and was sold only in drug stores.

During the years in question, The Stuart Company kept its books and filed its returns on an accrual basis of accounting. Its fiscal year ended on March 31, of each year.

Hanisch paid \$1,000 to The Stuart Company in exchange for its entire authorized capital stock of 1,000 shares at a par value of \$1 per share. Hanisch then transferred 250 shares of stock to two of his associates in the organizing of the corporation and transferred 150 shares to Maxwell H. Lewis, as the representative of Vita-Food. He retained 600 shares for himself. Between May 5, 1941, and November 28, 1942, Hanisch loaned \$70,000 to The Stuart Company for working capital.

The Shaler Food Products Company, named after Hanisch's elder son, was also incorporated under the laws of California on March 27, 1941. It was organized to distribute through grocery stores a similar vitamin concentrate manufactured by Vita-Food under the trade names "Vitaplex" and "Calplex." "Vitaplex" and "Calplex" were advertised directly to the public.

Hanisch paid \$1,000 to The Shaler Food Products Company in exchange for its entire authorized capi-

tal stock of 1,000 shares at a par value of \$1 per share. Hanisch then transferred 250 shares of stock to two of his associates in the organizing of the corporation and transferred 150 shares to Maxwell H. Lewis, as representative of Vita-Food. He retained 600 shares for himself.

On May 5, 1941, The Stuart Company and The Shaler Food Products Company as first parties, Vita-Food as second party, and Hanisch as third party entered into a formal written contract which memorialized the prior informal agreements between Hanisch and Vita-Food. This contract provided, inter alia:

2. The Stuart Company, one of first parties, agrees that the concentrate received by it under said contract of March 7, 1941, will be sold and distributed under second party's trade-mark or label "The Stuart Formula" and/or under such other of second party's trade-marks or labels as may be mutually agreed upon by first and second parties, to retail at \$1.95 per pint bottle plus any applicable sales tax.

3. Shaler Food Products Company, one of first parties, agrees that the concentrate received by it under said contract of February 3, 1941, will be sold and distributed under second party's trade-mark or label "Vitaplex" and/or under such other of second party's trade-marks or labels as may be mutually agreed upon by first and second parties to retail at \$1.59 per pint and 69c per 5 fluid ounces, plus any applicable sales tax.

4. First parties shall, within a reasonable time, undertake and carry on at their sole expense, an appropriate and adequate sales campaign for the purpose of creating and maintaining a satisfactory market for such products.

5. Except as herein otherwise provided, the products of second party shall be sold for commercial use and resale only through first parties, but it is understood that second party can not economically operate its plant at an average production of less than 2,000 pints per day of all items and the prices to be paid to second party for its said products as hereinafter set out are based upon this fact. * * *

6. First parties shall have the exclusive right to sell said Vitaplex and Stuart Formula until November 1, 1941. Such right shall continue thereafter until November 1, 1941. Such right shall continue thereafter until and unless terminated by written notice from second party, provided, however, that such termination shall not become effective until and unless during any sixty day period between said November 1, 1941, and May 1, 1942, the combined purchases of such products by first parties from second party shall not have averaged fifteen hundred pints per day, or unless during any sixty day period after said May 1, 1942, such purchases shall not have averaged two thousand pints per day; and, provided further, the date of any such termination shall be not less than sixty days from and after such notice of termination of said right. In determining performance hereunder consideration shall be given to

purchases by first parties from second party of any other products on a dollar basis at the prices paid therefor. First parties shall not be held to strict performance hereunder if such failure is due to conditions beyond their control, such as adverse legislation, strikes and/or delays in transportation.

7. First parties shall handle no other products than those manufactured or produced by second party, and shall be the sole distributors of all products manufactured or produced by second party except as herein otherwise provided.

* * *

10. Any and all trade-marks or labels under which the concentrates hereinbefore specifically described or any other products manufactured by second party which may hereafter be marketed or distributed or offered for sale by first parties or either thereof, shall at all times be and remain the sole and exclusive property of second party, and the right or rights of first parties to distribute and/or market or offer for sale such products or any other product hereafter produced by second party shall continue only so long as this agreement is in full force and effect.

11. Second party shall not directly or indirectly sell any of its products to any person, firm or corporation other than first parties, save and except the product now being marketed under the name "Vital" in Los Angeles County, * * *

12. Second party agrees to fill all orders placed

by first parties as promptly as possible consistent with the receipt of materials, conditions of labor, and other matters within its control. * * *

* * *

19. This contract shall remain in full force and effect for the period of ten years from and after the date hereof, and may be extended at the option of first parties for an additional period of ten years by written notice to second party, * * * provided, however, that this contract may be terminated by second party if for any sixty consecutive days, at any time after November 1, 1941, first parties shall not have purchased the minimum quantities of products hereinbefore specified in paragraph 6 (six) hereof, upon sixty days notice of intention so to do, unless during such sixty-day period any such deficiency shall be removed and the minimum quantities aforesaid ordered and paid for; otherwise, all rights of first and third parties hereunder shall cease at the expiration of the sixty-day period specified in such notice of termination.

Vita-Food experienced certain difficulties during 1941 in the manufacture of the vitamin concentrates which it supplied to The Stuart Company and to The Shaler Food Products Company for distribution. The bottled product sometimes became gaseous from exposure to the sun and exploded or ran over the sides of the bottle. The total damage was less than 1 per cent of the gross sales of the vitamin concentrates. Vita-Food made complete restitution of all damage caused, and by the end of 1941 had

solved the problem by making a minor change in the formula.

On June 23, 1942, a certificate of registration of the trade-mark "The Stuart Formula" was issued to Vita-Food by the Secretary of State of California. On September 8, 1942, the United States Commissioner of Patents issued to Vita-Food a certificate of registration of the trade-mark "The Stuart Formula" in accordance with an application under the Trade-mark Act of 1920 which had been made by Vita-Food on May 15, 1941.

The operations of The Shaler Food Products Company were never successful and that corporation was merged with the petitioner on July 3, 1942. The petitioner subsequently received permission from the Commissioner of Corporations to increase its capital stock by 1,000 shares, and these additional shares were issued to its original stockholders in proportion to their holdings.

As early as February, 1942, the petitioner began negotiations with Vita-Food in order to modify the contract of May 5, 1941. Petitioner desired to acquire an express owner's interest in the trade-mark and wanted to obtain lower purchase quotas and lower purchase costs. In August, 1942, the petitioner informed Vita-Food that it would not undertake an extensive sales promotion campaign unless it was given an interest in the trade-mark. On August 10, 1942, Vita-Food submitted a redraft of the contract to the petitioner, in which the petitioner was given a conditional one-half interest in the trade-mark, provided its sales reached and main-

tained a certain level. The petitioner rejected this redraft because it was not given a one-half interest in the trade-mark in fee simple and because the cost and the purchase quotas were not satisfactorily adjusted.

In September, 1942, Hanisch was informed that it was possible to obtain the vitamin products which were being supplied to The Stuart Company by Vita-Food for approximately one-half the price that Vita-Food was charging. Thereupon, Hanisch made an independent investigation of the price at which comparable products could be obtained from other manufacturers and discovered that they were available at substantially lower prices.

The petitioner was never able to meet the purchase quotas called for by paragraph 6 of the contract of May 5, 1941, and on October 8, 1942, Vita-Food served written notice on petitioner that since "you have failed to meet your quotas for the 60-day period from and after August 1, 1942, * * * your exclusive right to sell under the said contract is hereby terminated in accordance with paragraph 6 thereof. This termination shall be effective sixty (60) days after the service of this notice. In all other respects, the contract remains in full force and effect."

On October 12, 1942, the petitioner informed Vita-Food that:

We shall endeavor to the best of our ability to reinstate the contract dated May 5, 1941, by removing the shortages in quotas. However, in

fairness to you, we should inform you that we do not believe this will be possible.

If we are unable to reinstate the contract we shall regard it as terminated for all purposes, at the expiration of 60 days from date of notice, in accordance with the provisions of Paragraph 19 thereof which incorporates Paragraph 6 of the contract.

You having given notice of termination the same is accepted in accordance with the provisions of the contract and we do not concede the existence of any such intermediate procedure as you suggest. No attempt on your part to withdraw the notice will be recognized.

The petitioner then consulted three trade-mark counsel on the question of the ownership of the trade-mark "The Stuart Formula." Two of the opinions received were to the effect that the ownership of the trade-mark was in Vita-Food; one of the opinions declared that in so far as the contract of May 5, 1941, purported to invest in Vita-Food the title to the trade-mark it was a nullity, and that the registration of the trade-mark by Vita-Food was cancellable upon application by the petitioner to the United States Patent Office.

The petitioner and Hanisch, acting individually, began a series of conferences with Vita-Food on November 18, 1942, in order to settle their differences. These conferences were unsuccessful, and on November 23, 1942, the petitioner and Hanisch sent to Vita-Food a notice of rescission of the contract

of May 5, 1941, based upon fraud in the inception of the contract and failure of consideration in its performance.

On November 25, 1942, Vita-Food filed suit in the Superior Court of the State of California for the County of Los Angeles, in which it asked that court to permanently enjoin the petitioner and Hanisch from using the trade-mark "The Stuart Formula" upon any product not manufactured by Vita-Food. On November 25, 1942, the court issued a restraining order temporarily enjoining the petitioner from using the trade-mark, as requested by Vita-Food, and ordered the petitioner to appear on a specified date and show cause why the restraining order should not be made permanent.

Prior to the expiration of the time for the filing of an answer by petitioner, negotiations were resumed between petitioner and Vita-Food, and a settlement of the difficulties between the parties was reached. This agreement was entitled "Agreement of Settlement of Litigation and Cancellation of Contract," and provided:

It is hereby agreed by and between The Vita-Food Corporation, first party; The Stuart Company, second party, and Arthur O. Hanisch, third party, as follows:

Whereas an action is now pending in the Los Angeles County Superior Court by first party as plaintiff against second and third parties and others as defendants, being Action No. 482045, and Whereas the parties hereto did on May 5, 1941, execute an agreement in writing to which

reference is hereby made for full details, and Whereas the parties hereto desire to settle and adjust all their disputes and differences against and with each other whether involved in said pending litigation or otherwise, so that said action can be dismissed, said contract cancelled and terminated, and Whereas said litigation involves the dispute, among other things, as to the claim of second party to the ownership of a trade-mark, "The Stuart Formula," which trade-mark second party claims to own, and Whereas second party desires to maintain the continuity of the present market therefor, and Whereas first party in addition to the covenants of the second and third party herein and as a part thereof relies upon the personal ability of third party as managing agent of second party.

Now Therefore It Is Agreed:

1. First party agrees to dismiss with prejudice said action No. 482045. All parties hereto agree that the said agreement of May 5, 1941, is hereby cancelled and terminated as fully and to the same extent as though the same had never been executed, and all parties hereto hereby waive and release any and all claims and demands of every kind, character or description which any thereof have, or may have or claim to have against any thereof, or the officers, agents, or employees of any of them, whether by reason of said contract or otherwise. * * *

2. First party quitclaims without warranty (except that it does warrant that it has not heretofore conveyed, assigned or encumbered any right therein) to the second party the trade-mark "The Stuart Formula." First party agrees to execute appropriate assignments, if requested, or registrations on file with the Secretary of State of the State of California and the U. S. Commissioner of Patents.

3. Second and third parties agree to pay to First Party the sum of \$75,000.00, as follows: \$35,000.00, upon the execution of this agreement, receipt of which is hereby acknowledged by first party, and \$40,000.00, payable at the rate of \$4,000.00, per month as per note executed concurrently herewith, which note shall be an obligation independent of but not in addition to the above amount.

4. Second party agrees to pay to first party on a royalty basis and as additional consideration for the execution of this agreement the sum of \$122,700.00, which sum is additional to the above mentioned \$75,000.00. The said \$122,700.00, shall be paid at the rate of $7\frac{1}{2}$ cents per unit of vitamin concentrates as sold and marketed by second party beginning October 1, 1943, and continuing until the said sum of \$122,700, is fully paid. * * * Such payments shall be paid on the equivalent of the said unit of vitamin concentrates whether the same shall hereafter be sold and marketed in liquid, tablet, or in any other physical form or whatever the size of the package or packages by second party, whether sold under the trade-mark The Stuart Formula or not. * * *

6. Second and third parties agree that if prior to full payment of the sums agreed to be paid to first party in accordance with paragraphs 3 and 4 hereof either (a) the business of second party is sold or (b) the good will of the business of second party is sold or (c) the trade-mark "The Stuart Formula" is sold or licensed by second party to any other person, firm or corporation, or (d) an attempt is made by second or third party to do any of the acts in this paragraph 6 specified, then, and in any such event, the balance remaining unpaid upon the obligations of second party set forth in par. 4 hereof shall become forthwith due and payable by second and third parties jointly and severally to first party.

7. In the event of the abandonment of said trade-mark "The Stuart Formula" by Second Party or of the insolvency or bankruptcy of second party the trade-mark "The Stuart Formula" and all registrations thereof shall vest in and be the property of first party. * * *

8. Arthur O. Hanisch third party covenants and agrees that until full payment of the sum specified in paragraph 4 hereof he will not pledge or assign his stock in second party so as to reduce his holdings to less than 51% of the capital stock of second party. Third party understands and agrees that his obligations herein set forth are primary upon him with reference to the provisions set forth in paragraphs 3, 5, 6 and 8 but not paragraph 4, except as referred to in paragraphs 5, 6, and 8, and not merely those of guarantor or surety.

9. Second and Third parties hereby waive and relinquish to and in favor of First party any claims or interest that they or either of them may have in and to the trade-marks named as follows: "Vitall," "Calplex," "Made by the Calplex Process," "Buoyant B" and "Vita-Diet."

* * *

12. First party hereby assigns to third party whatever capital stock of second party and/or Shalor Food Products Company now standing in the name of Max H. Lewis, which is represented by certificates now in possession of second party.

* * *

On November 30, 1942, Vita-Food delivered to the petitioner the certificates of registration of the trade-mark "The Stuart Formula," which Vita-Food had obtained in its name. A formal assignment of Vita-Food's interest in the trade-mark to the petitioner was executed by Vita-Food on June 24, 1943.

From May 5, 1941, to October 31, 1942, the petitioner made gross sales of "The Stuart Formula" totalling \$437,613.87. During that period 17,428 doctors were personally contacted and induced to recommend "The Stuart Formula" to their patients, and 6,746 drug stores were retailing "The Stuart Formula."

From the date of its organization on March 27, 1941, until October 31, 1942, the petitioner suffered net operating losses, as shown by its books, which totalled \$15,451.56. On October 31, 1942, the peti-

tioner had total assets of \$62,159.47, and total liabilities of \$82,489.98.

Since November 28, 1942, the petitioner has distributed vitamin concentrates produced by other vitamin manufacturers under the trade name "The Stuart Formula."

The shares of stock in the petitioner had no value on November 28, 1942.

The petitioner was primarily obligated to pay \$75,000 to Vita-Food under the contract of November 28, 1942, in order to secure the cancellation of an onerous contract, of which \$35,000 was paid upon the execution of the agreement and \$40,000 was paid from December, 1942, through September, 1943, in monthly installments of \$4,000 each.

The petitioner was also primarily obligated to pay \$122,700 to Vita-Food under the contract of November 28, 1942, for the purchase of the trademark, "The Stuart Formula," at the rate of 7½ cents per unit of vitamin concentrates sold by the petitioner after October 1, 1943.

OPINION

Harron, Judge:

The issue in this proceeding is whether, considering all the facts, the payments made by the petitioner pursuant to the contract of November 28, 1942, were made, either in part or in whole, for the purpose of cancelling an onerous contract as contended by the petitioner; or whether they were made, either in part or in whole, for the purchase

of the trade-mark, "The Stuart Formula," as contended by the respondent.

It is well settled that payments made to secure relief from an onerous contract are deductible as ordinary and necessary business expenses under section 23(a) of the Internal Revenue Code. *Helvering v. Community Bond & Mortgage Co.*, 74 Fed. (2d) 727; affirming 27 B.T.A. 480; *Alexander J. Cassatt*, 47 B.T.A. 400; aff'd., 137 Fed. (2d) 745; *Cleveland Allerton Hotel, Inc., v. Commissioner*, 166 Fed. (2d) 805. And it is equally well settled that the purchase of a trade-mark is a capital expenditure, no part of which is deductible as a business expense. *Seattle Brewing & Malting Co.*, 6 T.C. 856; aff'd., per curiam, 165 Fed. (2d) 216; *Coca-Cola Bottling Co.*, 6 B.T.A. 1333; cf. *Rainier Brewing Co.*, 7 T.C. 162; aff'd., per curiam, 165 Fed (2d) 217.

Upon careful consideration of the terms of the contract of November 28, 1942, the conduct of the parties in the execution of its provisions, their statements, the testimony of disinterested witnesses, and our examination of the various other contracts and exhibits placed in evidence at the trial, we have concluded that the petitioner, which was on an accrual basis, was obligated to pay \$75,000 to Vita-Food to secure cancellation of the contract whereby it was bound to buy vitamin products exclusively from Vita-Food, and that the petitioner was obligated to pay \$122,700 to Vita-Food for the purchase of the trade-mark, "The Stuart Formula."

The evidence discloses that the petitioner desired to abrogate the contract under which it was bound

to buy all the vitamin products which it distributed from Vita-Food because it could obtain similar vitamin concentrates at substantially lower prices from other manufacturers. It therefore entered into negotiations with Vita-Food to effect a settlement of the contract. These negotiations were finally successful, and we have found as a fact that, as part of the settlement agreement, the petitioner agreed to pay \$75,000 to Vita-Food to cancel the contract.

Examination of the evidence also discloses that the remainder of the consideration called for by the contract is properly allocable to the purchase of the trade-mark, "The Stuart Formula." The petitioner desired to continue in the business of distributing vitamin concentrates to retail outlets. Much good will had been built up for "The Stuart Formula" through the extensive merchandising campaign conducted by the petitioner during 1941 and 1942. Prior to November 28, 1942, the petitioner made a number of attempts to purchase an interest in the trade-mark, but was unable to achieve a satisfactory agreement with Vita-Food. From May 5, 1941, to October 31, 1942, the petitioner made gross sales of "The Stuart Formula" totalling \$437,613.87. During that period, 17,428 individual doctors had been personally contacted and induced to recommend "The Stuart Formula" to patients who were in need of additional vitamins and vitamin concentrates under the name "The Stuart Formula" were being retailed by 6,746 different drug stores. From our examination of all the evidence, we have found as a fact that the petitioner pur-

chased the trade-mark, "The Stuart Formula," for \$122,700, to be paid at the rate of 7½ cents per unit of vitamin concentrates sold by the petitioner after October 1, 1943.

As part of the settlement agreement between the petitioner and Vita-Food, Vita-Food assigned to Hanisch 300 shares of stock of the petitioner which had been issued to Maxwell H. Lewis as representative of Vita-Food. The petitioner introduced competent evidence that this stock had no value on November 28, 1942, and respondent has made no contention that it did have any value. We have found as a fact that the 300 shares of stock assigned by Vita-Food had no value, and no part of the total consideration paid by the petitioner under the contract of November 28, 1942, with Vita-Food is properly allocable to the purchase of these shares of stock.

In accordance with our findings of fact, it is held that \$75,000 paid by the petitioner to secure the cancellation of an onerous contract is properly deductible during the fiscal year 1943 as an ordinary and necessary business expense, and that \$122,700 which the petitioner was obligated to pay for the purchase of a trade-mark is a capital expenditure which is not deductible as an ordinary and necessary business expense.

Decision will be entered under Rule 50.

[U. S. Tax Court Seal.]

Received June 28, 1950.

Served June 30, 1950.

Entered June 30, 1950.

The Tax Court of the United States
Washington
Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determinations of the Court in its Memorandum Findings of Fact and Opinion entered on June 30, 1950, the respondent has filed recomputation of the liability of the petitioner for taxes, with which the petitioner agrees. Accordingly, it is

Ordered and Decided: That there are no deficiencies in income tax, in declared value excess profits tax, or in excess profits tax for the fiscal year ended March 31, 1943; that there is a deficiency in excess profits tax for the fiscal year ended March 31, 1944, in the amount of \$1,507.08; and that there are deficiencies in income tax, in declared value excess profits tax, and in excess profits tax for the fiscal year ended March 31, 1945, in the amounts of \$10.79, \$6,591.80, and \$67,535.53, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered September 22, 1950.

Served September 26, 1950.

The Tax Court of the United States
Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

January 28, 1948—10:00 A.M.

(Met pursuant to notice.)

Before: Honorable Marion J. Harron,
Judge.

Appearances:

A. CALDER MACKAY,
ARTHUR MCGREGOR, and
F. EDWARD LITTLE,
728 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles, California,
Appearing for the Petitioner.

R. E. MAIDEN,
(HONORABLE CHARLES OLIPHANT,
(Chief Counsel, Bureau of Internal Revenue),
Appearing for the Respondent.

PROCEEDINGS

The Clerk: Docket No. 12,473, The Stuart Company.

Mr. Mackay: Ready for the Petitioner, A. Calder

Mackay, Arthur McGregor and F. Edward Little appearing for Petitioner.

Mr. Maiden: Ready for Respondent, R. E. Maiden.

The Court: You may proceed.

Mr. Mackay: Your Honor, at this time we should like to file a motion to amend the petition and also the amended petition attached thereto. Counsel has been submitted with a copy to this, and I understand there is no objection, and I am filing the required copies.

The Court: Without objection, the copies may be received. Counsel is given the stipulated time to file the answer.

Mr. Maiden: If your Honor please, I have my amended answer here now.

The Court: The amended answer is received.

Opening Statement on Behalf of the Petitioner

By Mr. Mackay:

Now, if your Honor please, The Stuart Company, Docket No. 12,473, comes before this court by reason of proposed deficiencies made by the Commissioner of Internal Revenue in income, declared value excess profits taxes and excess profits taxes for the fiscal year ending March 31, 1943, [3*] 1944 and 1945 in the following amounts: Income taxes, \$2,020.94; declared value excess profits taxes, \$6,855.50, and excess profits taxes, \$128,591.43.

Now, if your Honor please, the deficiencies arise largely because the Respondent disallowed as deductions expenditures made by Petitioner during

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the years involved in consideration of the cancellation of an onerous contract.

Our evidence will show that on or about May 5, 1941, Arthur Hanisch, individually, Petitioner, The Vita-Food Corporation and Shaler Food Products Company entered into an agreement under the terms of which The Vita-Food Corporation was to manufacture and Petitioner was to sell and distribute certain vitamin concentrates to be known as "the Stuart formula." Petitioner agreed to purchase only from The Vita-Food Corporation and to sell at prices fixed by The Vita-Food Corporation.

Now, in this contract, if your Honor please, the Shaler Food Products Company is mentioned. That company was organized and was part of this contract to sell vitamin products under the name of "Vitaplex" to the grocery stores. It was merged into Petitioner in July, 1942.

Now, our evidence will show that the operations under the above-referred-to contract were never satisfactory or profitable to Petitioner. Chiefly, the pricing arrangement did not permit Petitioner to make a satisfactory profit. The [4] result of Petitioner's operations will be presented to the Court and it will show that notwithstanding the fact that no salary or compensation was paid to Mr. Hanisch, who financed and managed Petitioner's operation, the company nevertheless suffered losses or made very little profit at any time prior to the time of the cancellation contract, which I shall later refer to, and which was dated November 28, 1942.

Our evidence will show that Mr. Hanisch did not

take a salary because one of his main purposes for going into this business was to provide vitamins at a price that would make them available to the masses of people, for at that time the principal vitamin product was selling at \$4.75 a pint—too high for the average person to obtain.

Our evidence will show that Mr. Hanisch had been ill for a number of years with tuberculosis and he had been going from sanitarium to sanitarium, and that in 1940 he met Dr. Borsook of the California Institute of Technology who was the head of the nutritional department. Dr. Borsook interested him in the possibility of supplying vitamins to the masses at a price which they could afford or pay or buy.

Our evidence will show that the Vita-Food Corporation was guilty of misrepresentations as to the quality and nature of its product, as to its research facilities and its ability to produce, its financial ability and also its [5] secret process.

Our evidence will show that it had no secret process to make this product. Now, at the time of the execution of the agreement representations were made by Vita-Food that the vitamin product had been developed in the laboratory of the California Institute of Technology, which Mr. Hanisch later found to be false.

Our evidence will show that the product was not stable as had been represented; that the product in liquid form was ill-tasting and had a tendency to ferment, which frequently caused bottles to explode on the dry store shelves and in doctors' offices.

In September, 1942, it was discovered by Mr. Hanisch, president of the Petitioner, The Stuart Company, that superior products could be obtained elsewhere under more favorable circumstances and at a much lower cost.

As a result of this situation, disputes arose and relations between the parties became quite strained. Notice of termination of the contract was given by the Petitioner and Vita-Food Corporation claimed that Petitioner could buy only from Vita-Food. Complaints were drawn up and litigation was threatened by both sides. Vita-Food completed its complaint first and filed it in the Superior Court.

Our evidence will show that both parties claimed ownership of the trade-mark, "the Stuart [6] formula."

Our evidence will show that the name "Stuart" in the formula was the name of Mr. Hanisch's son; also that the products sold by Petitioner, while containing the label bearing the trade-mark, "the Stuart formula," were sold as products of Petitioner and not as the products of The Vita-Food Corporation.

The evidence will show that an application for the trade-mark was filed in September, 1942, by Vita-Food, but it was, as our evidence will show, invalid because of misstatements in the application, and that Mr. Hanisch at that time had procured the opinion of patent attorneys to that effect.

Now, immediately upon filing its complaint The Vita-Food Corporation, as our evidence will show, requested a conference looking to the settlement of

their differences. Conferences were held, and as a result of protracted negotiations a contract dated November 28, 1942, was entered into, and this was the contract, if your Honor please, under which the sums of money, \$197,000.00, were expended by the taxpayer during these years and which the Commissioner of Internal Revenue has treated as part of the purchase price of assets and not as ordinary expenses.

Now, if your Honor please, the contract of November 28, 1942, which is between The Vita-Food Corporation on the one hand and The Stuart Company and its principal stockholder, Mr. Hanisch, on the other hand, is designated—and I quote: [7] “Agreement of Settlement of Litigation and Cancellation of Contract.”

The contract recites briefly: “That there is a suit pending in the Superior Court between the parties; that the parties desire to settle all their differences.”

The contract further recites that the parties claim ownership in the trade-mark, “the Stuart formula.”

The contract provided among other things that the suit pending would be dismissed with prejudice; that the prior agreement between the parties, dated May 5, 1941, would be cancelled and terminated. The agreement also provided that the parties would waive and release each other from any and all claims and demands of every kind, character or description which any thereof have, or may have or claim to have against thereof.

The contract further provided that the Vita-Food Corporation would quitclaim without warranty to

The Stuart Company the trade-mark, "the Stuart formula." It also provided that the Stuart Company and Mr. Hanisch would pay to Vita-Food Corporation the sum of \$75,000.00 as follows: \$35,000.00 immediately, the balance of \$40,000.00 in monthly installments of \$4,000.00 each.

The contract under the agreement provided that The Stuart Company agreed to pay Vita-Food Corporation—"on a royalty basis and as additional consideration for the [8] execution of" the settlement agreement the sum of \$122,700.00. This sum of \$122,700.00 was agreed to be paid "at the rate of 7½ cents per unit of vitamin concentrates as sold" by The Stuart Company "beginning October 1, 1943, and continuing until the said sum of \$122,700.00 is fully paid."

Now, the contract, if your Honor please, defined what was designated as a unit of vitamin concentrates which agreed to be "the equivalent of one pint or 96 tablets of the product now being sold and marketed under the trade-mark of 'the Stuart formula' at the potencies now in effect in the Stuart formula liquid."

The contract further provided that the payments shall be paid on the equivalent of the said unit of vitamin concentrates whether the same shall hereafter be sold and marketed in liquid, tablet or in any other physical form or whatever the size of the package was packaged by second party, The Stuart Company, and here is the significant thing—whether sold under the trade-mark, "the Stuart formula," or not. In other words, the money was to be paid

irrespective of whether or not it was sold under the trade-mark, "the Stuart formula."

The contract further provided that if Mr. Hanisch should at any time fail to maintain his stock ownership and control of at least 51 per cent in the petitioner or should fail up to and including October 15, 1946, to continue as the [9] managing agent of The Stuart Company, then, in either such event he, Mr. Hanisch, would forthwith pay to Vita-Food Corporation the then remaining balance of the \$40,000.00 as well as the remaining balance of the sum of \$122,700.00.

The contract further provided that if The Stuart Company should sell its business, good will or sell or license the trade-mark, "the Stuart formula," the balance should be forthwith paid to Vita-Food Corporation.

I want to call your Honor's attention to one significant provision in the contract, as our evidence will show, which we believe the Commissioner of Internal Revenue has misunderstood. The contract provided that in the event of the abandonment of the trade-mark, "the Stuart formula," by the Stuart Company, that all registrations thereof shall vest in Vita-Food Corporation. It is our position here, if your Honor please, that the parties attached little importance to the trade-mark at that time. After all, it had been in existence only a short time, and if there was to be an abandonment of that, that it should vest in The Vita-Food Corporation, and without consideration.

Now, if your Honor please, our evidence will show that the Petitioner contemplated abandoning this trade-mark, and as a consequence, after the contract was written up the opposing contracting parties insisted to make an insertion requiring that if the abandonment had been made, it should then [10] vest in The Vita-Food Corporation.

Our evidence will show that after the signing of the settlement contract and the cancellation of the contract of May 5, 1941—well, I want to say this: Our evidence will show, if your Honor please, that the product they represented they had had considerable defects in it. It was a product containing multiple vitamins, but it had a molasses base, and the doctor found, and the consuming public also, that molasses would ferment and explode the bottles in the doctors' offices, as well as in the drug stores.

I may say that the manner of marketing this product wasn't through advertising in newspapers and advertising to the ultimate consumer. The Stuart Company proceeded along what is known as the ethical method of distributing and selling this product, that is to say, it advertised only in medical journals and sent samples to doctors and sent trained men to explain the product to the doctors. I mention this fact, if your Honor please, because I think it is unlike a trade-mark where you get a lot of advertising to the general public and it develops in the general public what it is. This particular product, as I say, went through the ethical route to the doctors who were the ones who prescribed its use.

Now, our evidence will show that the value of the Stuart product in its origination was not based upon the name itself, but the fact that Mr. Hanisch, through his sales [11] promotion efforts and the additional fact that he sold state quantities of vitamins at a much cheaper price than anybody else in the field, produced the volume of sales that he enjoyed at that time.

Our evidence will show that anybody could have produced a similar product under a similar sales promotion. Vitamins as such and as contained in the Stuart product were available to any manufacturer of vitamin products, and vitamins were bought with the idea of how many units could be obtained for a given amount of money.

Now, I may say, if your Honor please, and I want to emphasize this in my statement, that Galen B was the outstanding product being sold. That was being sold for \$4.75 a pint, too high for the masses to get.

The Stuart Company was required to sell and did sell its product for about \$1.95.

Now, if your Honor please, our evidence will show that the payments that were made here, pursuant to this contract, were made to cancel the onerous contract, that therefore they constitute ordinary and necessary expenses. This Court has held that in many cases, and I refer your Honor to the Community Bond & Mortgage Corporation case which was decided by the Board of Tax Appeals in 27 B.T.A. 480, which was affirmed in 74 F. (2d) 727. [12]

The Court: Mr. Mackay, has the Respondent allowed any deduction in each of these taxable years with respect to these payments?

Mr. Mackay: No, your Honor, he has not.

The Court: Well, if he pleaded the payments as a capital item instead of ordinary expense, wouldn't he have allowed something?

Mr. Mackay: Well, if your Honor Please, he disallowed all of them as deductions, and I assume he did it on the ground that—on his interpretation of the contract, that The Stuart Company had acquired this Stuart formula and had paid it for that, and there is no deduction allowed for the amortization of a trade-mark.

The Court: Well, I wanted to know what your understanding of the Respondent's determination is. That isn't clear from your statement.

Mr. Mackay: Well, my understanding is, if your Honor please, that he, the Respondent, has concluded that under this settlement agreement the entire \$197,000.00, which was paid represents the cost of acquisition of assets, principally, as I understand it, the Stuart formula, and that no part of that is deductible. Our position is the whole amount is deductible.

The Court: Why do you say the whole amount is deductible? [13]

Mr. Mackay: Because it is in the cancellation of an onerous contract. The contract was cancelled, the contract of May 5, 1941.

The Court: In other words, the Petitioner's

theory and the Respondent's theory are very far apart, then, is that right.

Mr. Mackay: Very far apart.

The Court: The difference between a theory that an expenditure is an investment in an asset and the theory that an expenditure is a payment in order to get out of or cancel an unsatisfactory contract?

Mr. Mackay: That is right, your Honor.

The Court: They are certainly two very different concepts.

Mr. Mackay: That is right, your Honor.

The Court: Now, what have you set forth in this amended petition, Mr. Mackay?

Mr. Mackay: I have two other small issues in here which relate to the amendment. The amendment relates to the postwar credit refund, just the refund credit for postwar under the Case of Altschult's Incorporation versus Commissioner, Docket No. 12317 T C No. 94, decided October 15, 1947. If I may be permitted, there are just two small issues——

The Court: I don't understand what this item is, Mr. Mackay. Is this a new claim raised now for the amended [14] petition for the first time?

Mr. McGregor: If your Honor please, the issue has to do with the invested capital item for the fiscal years ended March 31, 1944, and March 31, 1945, the amount of postwar credit determined for the previous two years, it should be noted that the Respondent in its 90-day notice of deficiency determines an excess profits tax for the fiscal year ended

March 31, 1943, of \$8,495.95, which results in a postwar credit of \$849.60, and for the year ended March 31, 1944, excess profits taxes of \$52,808.66. The postwar credit for these two years would be \$849.60 and \$5,280.87, respectively, which under the recent case of *Altschult's Incorporation versus Commissioner*, citation given, constitutes earnings and surplus at the beginning of the respective years as part of Petitioner's capital for excess profits tax purposes. They are on the invested capital basis for determining their excess profits credit.

The Court: Well then, this second issue relates to the amount, the excess profits credit, is that correct?

Mr. McGregor: That is correct.

The Court: In what years?

Mr. McGregor: 1944 and 1945.

The Court: Well, when the taxpayer computed its excess profits credit it did not take something into account?

Mr. McGregor: They didn't do that because they didn't [15] show any of this large excess profits tax which the Commissioner has determined, but it has been ruled in this case cited that the excess profits——

The Court: Let me ask you this: Is this an alternative contention?

Mr. McGregor: Yes, it will be an alternative. If Petitioner wins in his case, this will have no effect.

The Court: There would be a credit whether the

rule in the cited case Altschult's Incorporation versus Commissioner, would apply; is that correct?

Mr. McGregor: That is right. I think that that is a credit, that the taxpayer gets on the 10 per cent of the excess profits.

The Court: That is evidently what the rule of that case is, but whether you can properly import that into this case is something you have to establish. You are now raising that question in the amended petition?

Mr. McGregor: I believe that the Commission under Rule 50 would automatically take it into consideration and allow it. I don't know.

The Court: That is why I want to have this discussed at this time, because I think you had better have some understanding about that, otherwise you will have to establish that would properly follow in this case.

Mr. McGregor: Well, your Honor, the facts in the [16] case—the 90-day letter shows what the excess profits should be, and it shows the computation of the invested capital and it shows that this 10 per cent of the excess profits tax credit for each of these two years has not been taken into invested capital to allow their excess profits credit for the subsequent years. I think the record will speak for itself upon that.

The Court: No, if you are going to raise a new issue in your amended petition, an alternative issue, of course, you raise it and you have to establish it at the trial unless counsel for the Respondent agrees

that it is a matter that will be automatically taken care of under Rule 50.

Now, if you haven't done that up to the present time, you had better find out about it before you end the presentation of your case.

Mr. McGregor: Well, your Honor, we will see what he says with respect to the amended petition. If he admits the facts on those issues, we don't have to prove anything further. I haven't had a chance to read the answer yet.

The Court: Is anything else raised in your amended petition?

Mr. McGregor: Yes. The other issue has to do with respect to Respondent failing to allow as a credit to the excess profits tax determined for the fiscal years [17] ending March 31, 1943, and March 31, 1944, the postwar refund credit of excess profits taxes. It should be noted that the Respondent's notice of determination shows an excess profits tax liability for the year ended March 31, 1943, of \$8,495.95, and for the fiscal year ended March 31, 1944, of \$52,808.66, but fails to allow the postwar refund credit against such excess profits taxes in the sum of \$849.60, for the fiscal year ended March 31, 1943, and of \$5,280.87, for the fiscal year ended March 31, 1944, as required by Internal Revenue Code Sections 780, 781 and 784, although the Respondent has computed postwar credit refund for the fiscal year ended March 31, 1945. He does it one year, but not in the other two years.

By reason of this fact the Respondent has overstated the deficiency for the fiscal year ended March

31, 1943, of \$849.60, and for the fiscal year ended March 31, 1944, of \$5,280.87.

The Court: Is it just an error? Would the Respondent concede that it was just an error?

Mr. McGregor: Well, I don't know. It is a new tax, and they have had somewhat of a complicated way of treating it one time during the period. They would not make that refund credit through the Collector's office on additional taxes. I think that was modified, so later I think the 1946 Act or the 1945 Act permitted that refund of credit to be [18] made in the computation of the tax.

Now, they have done that with one year, but they didn't do it in the other two years. Now, I don't know of the cause for it.

The Court: Well, didn't you try to ascertain before the trial?

Mr. McGregor: I beg your pardon?

The Court: Didn't you try to find out before the trial of the case?

Mr. McGregor: Well, we did submit a stipulation of facts on this to counsel, but they have been so busy they couldn't get it checked to sign it.

The Court: That isn't what I asked you. I said didn't you find out prior to the trial why that credit had not been allowed in the earlier years?

Mr. McGregor: No, we did not, your Honor.

The Court: Now, are you relying simply on a regulation on this point or is there some amendment to the statute that you are relying on?

Mr. McGregor: I am relying strictly on the code

sections that I quoted, Sections 780, 781 and 784 which provide for that. [19]

Opening Statement on Behalf of the Respondent
By Mr. Maiden:

May it please the Court, the paramount issue in the case, and the one issue that accounts for the bulk of the deficiencies set up in the statutory notice is the one issue of whether payments made by this Petitioner to The Vita-Food Corporation under a document dated November 28, 1942, constitute payments made for the acquisition of a trade-mark called "the Stuart formula," or whether they represent payments as claimed by the Petitioner in consideration of the cancellation of a so-called onerous contract of May 5, 1941.

Now, briefly on that issue, if the Court please, the May 5, 1941, contract which was a contract whereby The Vita-Food Corporation was to sell to The Stuart Company at certain fixed prices vitamin concentrates to be sold and distributed by The Stuart Company under the trade name of the Vita-Food Corporation, specifically under the trade name of The Stuart formula. This contract provides specifically in Paragraph 2 that "The Stuart Company, one of the first parties, agrees that the concentrate received by it under said contract of March 7, 1941, will be sold and distributed under second party's trade-mark—" the second party being The Vita-Food Corporation—"or labelled 'The Stuart Formula,' and/or under such other second party's trade-marks or labels as may be mutually agreed upon by first and second parties." [20]

I might state that the contract of March 7, 1941, referred to in the May 1st contract was simply a letter sent to the Stuart Company—I mean, sent to Mr. Hanisch, I believe, by the Vita-Food Corporation, whereby it sets out that Mr. Hanisch was buying 3,000 gallons of this concentrate, and that it was understood that Mr. Hanisch would have two corporations organized, The Shaler Food Products Company and The Stuart Company, and that these two corporations would sell to the public this vitamin concentrate.

Now, not only does Paragraph 2 provide that the trade-mark The Stuart Formula is the property of The Vita-Food Corporation, but Paragraph 10 of the contract further provides, “Any and all trade-marks or labels under which the concentrates hereinbefore specifically described or any other products manufactured by second party which may hereafter be marketed or distributed or offered for sale by first party or either thereof, shall at all times be and remain the sole and exclusive property of second party—” the second party being The Vita-Food Corporation.

Now, if it please the Court, the proof will show in this case that the trade-mark “the Stuart formula” was, pursuant to the specific provisions of the contract of May 5, 1941, registered by The Vita-Food Corporation both in the State of California and at Washington.

Paragraph 20 provides that “Second party agrees to [21] comply with all governmental regulations as applied to it and to the manufacture of products

sold to first parties. Second party agrees further to apply for registration of trade names hereinbefore specifically mentioned—" one of them being "the Stuart formula," the trade-mark involved in this case— "and will likewise apply for registration of such trade names as may be mutually agreed upon covering future products which may be developed or manufactured by second party."

Now, if the Court please, this contract of May 5, 1941, provided that, under Paragraph 6, that the Stuart Company should have the exclusive right to sell the vitamin concentrates under The Stuart Formula or the trade name of The Stuart Company, but provided that in the event The Stuart Company failed for any 60 consecutive days to meet a minimum quota of purchases from Vita-Food, that then and in that event Vita-Food Company could serve a notice of cancellation of the contract, that the notice of termination of the contract would not become effective for 60 days after the service of the notice, during which time The Stuart Company could keep alive the contract by making up the deficiency in its quota agreement of purchases from Vita-Food Corporation.

There is a similar provision for termination of the contract contained in Paragraph 19. [22]

Now, if the Court please, in order to keep the chronology of facts, I want to state that The Vita-Food corporation on the 23rd day of June, 1942, registered this trade-mark in its name, that is, the trade-mark "the Stuart formula" with the Department of State for the State of California, and be-

came the registered owner of the trade-mark in the State of California. Thereafter on September 8, 1942, it received the registration in its name of this trade-mark "the Stuart formula" from the United States of America. Now, if the Court please, the evidence in this case as the Respondent will develop it will show that the Vita-Food Corporation would have been glad at any time to have cancelled without one dollar from The Stuart Company the contract of May 5, 1941. Under the contract of May 5, 1941, The Vita-Food Corporation was committed to sell all of its products through The Stuart Company, and only in the event of a cancellation of that contract could The Vita-Food Corporation sell its products through any other agency or distributor.

The facts will likewise show that certainly as early as the summer of 1942, that The Stuart Company commenced efforts to obtain title to this trade-mark "the Stuart formula" by direct offers of purchase to The Vita-Food Corporation.

The evidence will show that The Stuart Company first offered to pay \$15,000.00, for this trade-mark, that it [23] then raised that offer to approximately \$50,000.00, that it then raised the offer to approximately \$85,000.00 to \$100,000.00; all of which offers were rejected by The Vita-Food Corporation.

The evidence in the case will show that at no time during the existence of this agreement of May 5, 1941, did The Stuart Company meet its minimum quota purchases from The Vita-Food Corporation,

and that The Vita-Food Corporation from time to time waived the failure of The Stuart Company to come up to the quota purchases set forth in the contract, and that the purpose of the waiver was to enable The Stuart Company to properly develop this product and to give it a full and complete opportunity to make good under the contract and to derive the benefits of the profits expected from the sale of the product.

However, in the summer of 1942, Mr. Lewis of The Vita-Food Corporation—and I might state that Mr. Lewis was the moving spirit in and behind The Vita-Food Corporation and that he at all times spoke for and handled all of these transactions for The Vita-Food Corporation—Mr. Lewis had a conference with Mr. Hanisch, and Mr. Hanisch was——

The Court: Isn't this all matter that has to be proved, Mr. Maiden?

Mr. Maiden: I beg your pardon?

The Court: This is all matter that has to be proved? [24]

Mr. Maiden: It is, your Honor. Mr. Mackay put his interpretation upon the facts he wanted to prove, and I was sort of following suit.

The Court: Well, it has taken one hour, almost, for the opening statements. If we are to conclude the trial of the case, and I understand that it will take a day, I think we must get down to hearing evidence.

Mr. Maiden: Yes, ma'am.

The Court: May I ask you, please, now to bring your opening statement to a conclusion, and also

please take up the matter of the two matters mentioned by Mr. McGregor and which are evidently covered by the amended petition which seem to call for an adjustment of some kind rather than the introduction of evidence and the argument of the legal right of the Petitioner to the adjustment. I don't know what these two alternatives are.

Mr. Maiden: Briefly, in closing up the first issue, I do want to mention the fact that on October 8, 1942, the Vita-Food Corporation served notice of cancellation of this contract on The Stuart Company. On October 12, 1942, The Stuart Company acknowledged receipt of that notice and stated that they would try to bring up their quota, but that they doubted if they would be able to do so, and then advised The Vita-Food Corporation that they would not accept the reinstatement of the contract. On November 23, 1942, The Stuart Company served a [25] notice of rescission of the contract setting up it had been obtained under fraud and various other statements. On November 25, 1942, The Vita-Food Corporation filed an injunction suit in the Superior Court here in Los Angeles asking that The Stuart Company be enjoined from selling any vitamin concentrate products under the trade name of "the Stuart formula."

Then on November 28, 1942, the agreement of that date was entered into, and it is Respondent's contention in this case that the only real substance to that agreement was the acquisition for the full purchase price set forth therein of this trade-mark "the Stuart formula."

Now, if the Court please, on the little interest deduction issue, the Petitioner is claiming now for the first time no such deduction was made in its return, and, of course, it is not mentioned in the statutory notice that it is entitled to a deduction of some two thousand dollars.

Mr. Mackay: We are waiving that.

Mr. Maiden: Fine. Then that brings us to the remaining issue which is raised for the first time on the amended petition, and that is the right of the Petitioner to have included in the determination of its invested capital——

The Court: Now, let me just ask you to stop again. Why repeat all of that? I want to know what the Respondent's position is on the claims, or haven't you any position at [26] this time?

Mr. Maiden: Your Honor, I am inclined to believe that this case of Altschult's controls the issue in this case on that point.

The Court: Well, do you know yet or don't you? You say you are inclined.

Mr. Maiden: Well, I wouldn't be positive about any matter of law, if the Court please, without——

The Court: Very well, we will pass the matter. You are not in a position now to state—I don't want to repeat the word "position"—but I will do that, anyway—Respondent is not prepared at this time to answer the Petitioner on the propriety of these two alternative claims, is that correct?

Mr. Maiden: That is right, your Honor.

The Court: Then I will ask counsel during the recess, which we will take, to go over this matter so

that the Court will know whether we are going to hear evidence on one issue or three issues, because this is quite unusual. Ordinarily we know at the beginning of the trial whether we are going to hear evidence on one issue or several issues. We also know where the parties have been agreed and what can be followed under Rule 50.

Now, if you haven't worked that out up to the present time, I shall ask you to work that out and report [27] back sometime during the day, or at least before the record in this hearing is closed.

Now, let's just drop that and proceed, please, because we are not making any headway with our offering in the hearing of evidence.

Mr. McGregor: I might call the Court's attention to the fact that one of these issues was a case just tried on the last call of the calendar on the California Vegetable Concentrates.

The Court: Well, I pointed that out because it is a matter that counsel should be able to agree on during the trial and you haven't done so yet, and I would much prefer that you do that before the conclusion of the hearing rather than merely state that you think the Altschult's case will apply. I don't know and you don't know whether it will or not. It makes it too difficult when briefs are filed to find out that there was an issue that wasn't tried, and it has to be worked out by the Court in some way when the briefs are filed. You know that these briefs that are filed by the government have to go back to Washington, they have to be reviewed, and it is my

experience that loose ends of this kind can cause a lot of trouble.

Can we pass this now?

Mr. McGregor: In my opinion it should be worked out under Rule 50. [28]

Mr. Maiden: May I say——

The Court: May I have the last word, gentlemen? I have said this three times, you haven't up to the present time consulted with each other on it. The Court wants you to consult with each other on it during the trial of the case, and not wait until you get to the Rule 50 recomputation which may be made eight months from now. Do you understand that, Mr. McGregor?

Mr. McGregor: Yes, your Honor.

The Court: All right. Let's be in agreement on that.

Are you ready to proceed with the evidence?

Mr. Mackay: Yes, your Honor.

May I call for the returns for the fiscal years 1942, '43, '44 and '45?

Mr. Maiden: You may, and here they are, Mr. Mackay.

Mr. Mackay: You handed me, counsel, the returns for 1943, 1944 and 1945, but not for 1942. I understand you do not have it?

Mr. Maiden: I do not have it for 1942, and I have agreed that you might put in for 1942 your copy of that return and I would raise no objection.

Mr. Mackay: It is agreed that these may be withdrawn and photostats substituted?

Mr. Maiden: If it is agreeable with the [29] Court.

Mr. Mackay: I would like to offer these in evidence.

The Court: How do you want them marked, Mr. Mackay?

Mr. Mackay: May they be marked consecutively?

The Clerk: There are five separate documents.

The Court: Well, Mr. Mackay, we could make the return for 1945 No. 1, or we could make it Exhibit 5.

Would you mind offering them, please?

Mr. Mackay: Yes, your Honor.

I should like to offer the returns here which are for the fiscal year 1941, the corporation excess profits tax return as well as the corporation income and declared value excess profits tax return as one exhibit.

The Court: Whose return is that?

The Clerk: The Stuart Company, if your Honor please.

The Court: It is received as Exhibit No. 1 with leave to withdraw the document and substitute a photostatic copy.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 1.)

Mr. Mackay: I should like to offer in evidence, if your Honor please, a similar return for the year 1943 as Exhibit No. 2.

The Court: It is received as Exhibit No. 2.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 2.) [30]

Mr. Mackay: As Exhibit 3, I should like to offer in evidence similar returns for the fiscal year ended March 31, 1944.

The Court: It is received as Exhibit No. 3.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 3.)

Mr. Mackay: As Exhibit No. 4, similar returns for the year ended March 31, 1945.

The Court: It is received as Exhibit 4.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 4.)

The Court: Is that four returns, Mr. Clerk?

The Clerk: I have four returns, your Honor.

The Court: You may proceed.

Mr. Mackay: Mr. Ferguson, please.

Whereupon,

HOWARD FERGUSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name, Mr. Witness?

The Witness: Howard Ferguson.

Direct Examination

By Mr. Mackay:

Q. What is your occupation, Mr. Ferguson?

(Testimony of Howard Ferguson.)

A. Certified Public Accountant. [31]

Q. You are practicing in Pasadena, are you?

A. Pasadena and Alhambra.

Q. I see. Are you familiar with the books and account of The Stuart Company?

A. Yes, I am.

Q. Are you employed by them?

A. No, I am not.

Q. Have you been? A. No, sir.

Q. Well, recently have you been employed to make a summary or schedule showing the payments made under the agreement of November 28, 1942.

A. Yes.

Q. I will ask you if the books of account are in court. Are the books of account of The Stuart Company in court? A. Yes, they are.

Q. I will ask you if you prepared this statement showing how the payments were reflected on the books under the agreement of November 28, 1942.

A. Yes, I prepared this.

Q. From the books of account? A. Yes.

Q. Are they correct? A. Yes, sir.

Mr. Mackay: If your Honor please, I would like to [32] offer this in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: That is a schedule of payments made under what agreement, Mr. Mackay?

Mr. Mackay: Under the agreement of November 28, 1942. That was the settlement agreement.

The Court: By The Stuart Company?

Mr. Mackay: By The Stuart Company.

(Testimony of Howard Ferguson.)

The Court: To The Vita-Food Corporation?

Mr. Mackay: To The Vita-Food Corporation.

The Court: It is received as Exhibit No. 5.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 5.)

Mr. Mackay: Now, if your Honor please, the returns are in, but in order to assist in understanding this case, I should like to introduce here what are The Stuart Company balance sheets to the tax returns. I think it would be a whole lot easier for the Court to see the loss and so on. I understand counsel has no objection.

Mr. Maiden: No objection.

The Court: It is a schedule showing comparative balance sheets taken from the tax returns of the years 1942 to 1945, inclusive, and is received as Exhibit No. 6.

(The documents above referred to were received in evidence and marked Petitioner's Exhibit No. 6.) [33]

Mr. Mackay: Now, if your Honor please, I call your attention to the fact that this agreement under which these payments were made is dated November 28, 1942. It became necessary, in our opinion, that we show the earnings of the company from March 31, 1942, the close of its last fiscal year, to October 31, 1942, which was the last full month before the date of the contract.

(Testimony of Howard Ferguson.)

Q. (By Mr. Mackay): I will ask you, Mr. Witness, if you prepared the statement of profit and loss as adjusted by proper accruals?

A. Yes, I did.

Q. Did you prepare that from the books of account?

A. Well, there are two periods covered. For the year ended March 31, 1941, that was taken from the tax return. For the seven months ended October 31, 1941, that was taken from the books as adjusted.

The Court: Why did you do that? Why did you take it partly from the tax returns and partly from the books?

The Witness: Well, your Honor, the short period, of course, could not be reflected on the tax return. For the earlier period we took them from the tax return because that has been submitted in evidence.

The Court: I see. What was the fiscal year of the Stuart Company?

The Witness: March 31st. [34]

The Court: The end of March 31st?

The Witness: Yes.

Q. (By Mr. Mackay): Now, you spoke about, Mr. Witness, some adjustments here. Will you please explain to the Court what adjustments you made?

A. Yes. From month to month at that time the Stuart Company did not accrue all of its expenses each month. They kept a record of their sales and cost of sales, but as to accruing interest and work-

(Testimony of Howard Ferguson.)

nary expenses, that was not done each month. This is done at the year end, and for the purposes of having a comparable statement for the short period here at October 31st, I did make certain adjustments.

Q. Did you prepare a statement showing those adjustments? A. Yes.

Mr. Mackay: If your Honor please, I should like to offer in evidence this statement which is entitled "Statement of Profit and Loss as Adjusted by Proper Accruing."

Mr. Maiden: There will be no objection to this, if your Honor please. I consider all this evidence is immaterial.

The Court: Received as Exhibit No. 7.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 7.)

Q. (By Mr. Mackay): Now, did you prepare a statement stating the [35] adjustments you just testified to? A. Yes.

Mr. Mackay: If your Honor please, I should like to offer these in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: Adjustments of what? Why do you want to introduce a schedule showing adjustments? Let me see Exhibit 7, please.

Well, Exhibit 7 is just for one year, Mr. Mackay.

Mr. Mackay: Yes, that is all we are trying to do, your Honor, is to show the earnings from the end of the last fiscal year up and including October 31, 1942.

(Testimony of Howard Ferguson.)

The Court: What about the earnings for the previous years?

Mr. Mackay: Well, we have already got those in evidence.

The Witness: Your Honor, could I explain?

The Court: What are these adjustments?

Mr. Mackay: Would you explain them?

The Court: You had better explain it into the record. If you are going to explain it now, I won't understand it later. You can refer to the document that is marked as Exhibit 7.

The Witness: Exhibit 7 shows the operating loss for the year ending March 31, 1942, per the tax return. That [36] was the first fiscal year, the first full year of the Stuart Company. They were incorporated at the end of March, 1941, and they opened their books of account as of April 1st, so this does take us back to the inception of the Stuart Company. Does that answer the question?

The Court: Yes. That wasn't clear before. Now, about the adjustments.

The Witness: The adjustments made for the seven months ended October 31, 1942, were the two major ones. There could have been very small items for depreciation and payroll tax, but the two major items are \$3,054.08 as interest accrued on notes payable. That was interest from April 1, 1942, to October 31st.

The Court: What is the difference in your final figure?

The Witness: Well, that is reflected in the loss

(Testimony of Howard Ferguson.)

of \$8,989.42 for the seven months ended October 31, 1942.

The Court: As shown on Exhibit 7?

The Witness: Yes.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Mackay, your schedule that you have just offered is impossible to understand. It doesn't jibe with Exhibit 7. It doesn't explain anything in Exhibit 7. It [37] apparently shows adjustments made to book figures. Well, the book figures are not in evidence, so it means nothing. It is an adjustment which pre-supposes a comparison, and if you don't have two comparatives to show one, it means nothing. You have got to show both. That doesn't show any change in any total figures of loss for these two periods. As shown on Exhibit 7, for example, those adjustments may have been taken into consideration in computing the loss for the first fiscal year and for the first seven months.

Now, let me ask you another question, Mr. Witness. You say this corporation was organized in 1941 and opened its books on April 1, 1941, is that correct?

The Witness: That is correct.

The Court: So its first year ended on March 31, 1942?

The Witness: That is correct.

(Testimony of Howard Ferguson.)

The Court: Your gross profit and loss for the first full year is shown on Exhibit 7?

The Witness: That is correct.

The Court: Now, why were you asked to compute, if you know, the gross profit and loss for 10 months, January 1, 1942, to October 31, 1942? What is the significance of that? That is part of the first fiscal year and part of the second fiscal year, isn't it?

The Witness: No. There is a little misunderstanding, [38] if I may say so. The seven months ended October 31, 1942, would be from April 1, 1942, to October 31, 1942.

The Court: I thought it said 10 months.

The Witness: No, it is seven months, your Honor.

The Court: Well, why were you asked to give the gross profit and loss for part of the first fiscal year, do you know?

The Witness: Yes, because that was the closing of the month just preceding this cancellation contract of November 28, 1942.

Mr. Maiden: If the Court please, I object to the witness interpreting this contract as being a cancellation contract.

The Court: All right.

Mr. Mackay: I will accept that rebuke.

The Court: The witness isn't trying to interpret the contract.

Mr. Mackay: If your Honor please, I think I can clear that up for your Honor. It is our view

(Testimony of Howard Ferguson.)

in asking this witness this question—we have the statement for the first fiscal year, and we want to show the financial condition, the profit and loss for the last full month preceding the date of the agreement of November 28, 1942.

The Court: The last full month?

Mr. Mackay: Yes, your Honor—the seven months, I [39] mean, the seven months' operations including the last full month, because we couldn't include in this statement the earnings for November because they hadn't happened at that particular time.

The Court: Off the record, again, please.

(Discussion off the record.)

The Court: On the record. The Court does try to follow the evidence, and you have had that experience before.

Mr. Mackay: Yes, I have.

The Court: I can't figure out what you mean by your second column. I think you had better put dates on here, that is, April 1, 1941, to such and such a date, 1942. Then it won't be ambiguous.

Mr. Mackay: I think that is a good suggestion.

The Court: The first 10 months ending January 1, 1942?

Mr. Mackay: I think you are right, your Honor.

The Court: Well then, I was right in one of the questions, when I asked you if this last column relates to the first fiscal year—it relates to the second fiscal year.

(Testimony of Howard Ferguson.)

The Witness: That is correct, there is no overlap there at all.

The Court: All right. That clears that up.

Mr. Mackay: Now, if your Honor please, with Exhibit [40] 7 in here, this shows the operations for those seven months ending October 31, 1942, with certain adjustments. I understood the witness to say that there had been some items there that hadn't been accrued monthly as the months went by, and that is the reason I wanted to put in the next exhibit, the adjustments he made to the books.

The Court: I still can't understand them because you would have to introduce something to show what the book figure is worth that was adjusted, Mr. Mackay, otherwise I can't weigh it. I don't know what weight to give it.

Let me tell you what I mean here. Let me see that schedule again. The accountant made an adjustment in payroll tax expense which he has an Item 1 of \$250.28. I don't know what that left, what it was before or what it was after or what the net effect of that adjustment was. It is a small item. I wouldn't know what that did. There is an adjustment, Item 7 of expenses, sales expense—a lot about seven small items with a total of \$2,018.61. Well, it is an adjustment of what? Does it make the expenses increase or decrease? Does it make the loss figures shown on Exhibit 7 increase or decrease, and why is it material anyway?

Mr. Mackay: Well, for this reason, your Honor: We are contending, of course, that this trade-mark

(Testimony of Howard Ferguson.)

had no value at this particular time. In order to prove that——

The Court: These are the figures of the [41] Stuart Company, isn't that right?

Mr. Mackay: Yes, your Honor, that is right, and we were the only ones who marketed under the Stuart name. Therefore, it is necessary to show what earnings there were or whether or not any earnings could be attributed to the trade-mark from the time it operated under that form in May, 1941.

The Court: This company does not contend that it owned the trade-mark?

Mr. Mackay: My opening statement said that.

The Court: Have you proved that you own it?

Mr. Mackay: Well, the next witness——

The Court: Well, I think you will have to have this witness remain and not take him out of order. I don't know what you are getting at.

Mr. Mackay: All right, I will withhold this exhibit.

(Witness excused.)

Mr. Mackay: Call Mr. Hanisch.

Whereupon,

ARTHUR HANISCH

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name, Mr. Witness, please?

(Testimony of Arthur Hanisch.)

The Witness: Arthur Hanisch. [42]

Direct Examination

By Mr. Mackay:

Q. Mr. Hanisch, what is your occupation?

A. I am president of the Stuart Company.

Q. How long have you been president of the Stuart Company?

A. Since its organization in March, 1941.

Q. What kind of business has the Stuart Company been carrying on since that time?

A. Distribution of vitamin products.

The Court: Mr. Mackay, I am going to interrupt here once, and then I will be finished. Please think of the psychology of the person who is listening to you.

Mr. Mackay: Thank you.

The Court: I don't know who the Stuart Company is, I don't know who the Vita-Food Company is. I listened to your opening statement very carefully. I know that it was general. Perhaps I am a little bit too methodical.

Mr. Mackay: No, I think not.

The Court: But to the Court, this is all a routine. It becomes very systematized, the matter of how the evidence is built up. I want to know who the dramatis personae of this story are. Who was the Stuart Company? Who owned the stock? How was it created? How much capital did it have when it was started? Who was the Vita-Food Corpora-

(Testimony of Arthur Hanisch.)

tion? [43] When was it organized? Who owned its stock? How much capital did it have?

If you will give me those basic things, first, and then get into what to you the interesting part of this matter is, I will be satisfied, but I will not be able to be patient and sit here unless I know what the under-pinnings of this structure are, because that is just the way my mind works. I have to know where the foundations are. Let's get into the basic facts, and then you can present your evidence in any way that you want, but I have to know what the relationships are, whether Vita-Food is partly owned by Stuart, for example; whether Stuart owns Vita-Food; or whether Vita-Food owns Stuart.

Mr. Mackay: I appreciate the suggestion, and I will bear that in mind.

Q. (By Mr. Mackay): Mr. Hanisch, will you please tell the Court when the company was organized?

A. The corporation was formed in the latter part of March, 1941.

Q. Do you know how much stock it issued?

A. \$1,000.00 in stock, and in addition to that, I guaranteed to loan the corporation working capital.

Q. Now, to whom was the stock issued?

A. The stock was issued to me, Mr. Pelletier, Mr. Lewis [44] and Mr. Pringle.

The Court: How many shares to each?

(Testimony of Arthur Hanisch.)

The Witness: There was a change later on, as I recall it.

The Court: No, how many shares originally?

The Witness: There was a thousand shares of a dollar each.

The Court: 1000 shares, \$1.00 each?

The Witness: That is right.

The Court: How many shares were issued to you?

The Witness: The thing was changed. I think at that time it was 60 per cent. At the present time I own 70 per cent. At the present time Mr. Pelletier owns 20 per cent and Mr. Pringle owns 10 per cent.

The Court: Mr. Lewis is out?

The Witness: That was an arrangement made at the time of the agreement of November, 1942.

The Court: It is a California corporation?

The Witness: Yes—now, I must explain—

The Court: What did you give for your stock? What did you turn into the corporation for the stock when it was issued to you?

The Witness: The cash of \$1000.00.

The Court: What did the others turn into the corporation for their stock? [45]

The Witness: Services. Mr. Pelletier went in on the basis to be a consultant with us. We had an operation in the grocery field, and I had no experience with it, so I wanted him in the corporation because I felt that he would be a very definite

(Testimony of Arthur Hanisch.)

asset, and they did help in the organization and in the formulation of our plans.

The Court: So the corporation was organized with \$1000.00 capital which you provided?

The Witness: That is correct. I must amplify that, however, your Honor, in that we had two corporations formed at that time. Now, that is the setup for the Stuart Company, but at the same time I formed another corporation, the Shaler Food Products Company.

The Court: That is not a party to this proceeding?

Mr. Mackay: No, your Honor, it is not a party to the proceeding, but it does have a bearing on it because the contract of May 5, 1941, does include the Shaler Company and that is the one that was cancelled by the agreement of November 28th, and the Shaler Company was merged in July, 1942, into the Stuart Company.

The Court: It was?

Mr. Mackay: Yes, sir. [46]

The Court: When did you acquire 70 per cent of the Stuart Company stock?

The Witness: Shortly after the settlement agreement of November 28th.

The Court: When I say "70 per cent," I mean the extra 10 per cent.

The Witness: Yes, it was shortly after that settlement agreement.

The Court: Whom did you acquire your extra 10 per cent from?

(Testimony of Arthur Hanisch.)

The Witness: From Lewis in our settlement agreement; he returned the stock. I must explain that the stock certificates had not actually been issued to Mr. Lewis, but I had an oral agreement to do that.

The Court: In other words, at all times you were in control of the Stuart Company?

The Witness: That is correct.

The Court: When was the Shaler Food Products Company organized?

The Witness: It was formed at the same time the Stuart Company was organized.

The Court: How many shares of stock?

The Witness: It had exactly the same stock setup.

The Court: The same stockholders?

The Witness: Yes. [47]

The Court: Did you put \$1,000.00 into that company?

The Witness: Yes.

The Court: All right, Mr. Mackay.

Q. (By Mr. Mackay): We have referred to the Vita-Food Corporation. Did you own any stock in that? A. No.

Q. Do you know who owned the controlling interest in it?

A. I do not definitely know. I was assured that Mr. Lewis had authority to speak for the corporation, but I have no idea whatever what the stock ownership was.

Q. Did your Stuart Company or the Shaler

(Testimony of Arthur Hanisch.)

Food Company either one, have any stock interest in the Vita-Food Corporation?

A. None whatever.

The Court: Well, who were the principals in the Vita-Food Corporation?

The Witness: It was very difficult for me to find that out.

The Court: Well, do you know when it was organized?

The Witness: I do not.

The Court: Was it a California corporation?

The Witness: I assume that it was.

The Court: Did Mr. Lewis have anything to do with it? [48]

The Witness: Mr. Lewis at one time was secretary and also treasurer. I have had letters from him signed "Secretary and Treasurer."

Mr. Maiden: If the Court please, Mr. Lewis is here and will appear as a witness in the case.

The Court: Very well.

Now, who were the officers of the Stuart Company in 1941 and 1942?

The Witness: I was president, Mr. Dunlap was assistant secretary.

The Court: Mr. Dunlap was assistant secretary.

The Witness: Could I ask Mr. Dunlap for those officers? I don't remember them.

The Court: No. If you don't remember, that will be brought out later.

Now, who were the officers of the Vita-Food Company, to the best of your knowledge?

(Testimony of Arthur Hanisch.)

The Witness: I don't know.

The Court: You don't know who the president was?

The Witness: No, because we had a different set of officers for the two companies.

The Court: I said the Vita-Food Company.

The Witness: No, I do not know.

The Court: Well, you were carrying on business dealings with them, weren't you? [49]

The Witness: That is correct.

The Court: You don't know who the president of the company was?

The Witness: At one time the president of the company was Paul Overton, but I do not know that he was president at the time the contract was signed.

The Court: Well, who signed the contract?

The Witness: Mr. Lewis signed the contract.

The Court: What office did he hold?

The Witness: He was treasurer of the corporation.

The Court: All right. What is his first name?

The Witness: Maxwell Lewis. I think the initials are "M. H.," I believe.

The Court: Maxwell H. Lewis was secretary. You don't know who the other officers were?

The Witness: I can't tell for a certainty.

The Court: Do you want to develop anything else on this, because we will take a recess in a few minutes?

(Testimony of Arthur Hanisch.)

Mr. Mackay: No, I think, your Honor, that covers about as much as I know about the corporate stock and the ownership. I have no questions, so if you want to take a recess, all right.

The Court: Will you please accommodate me by bringing out those basic facts through some one else later?

Mr. Mackay: Well, we can probably stipulate that. [50]

The Court: I want you to stipulate.

We will take a short recess.

(Short recess taken.)

The Court: You may proceed.

Mr. Maiden: It might clarify the Court's inquiry somewhat, if I state at this time the Vita-Food Corporation was organized as a California corporation in November of 1940, that its president was a Mr. Overton, its vice-president to start off with was Mr. M. H. Lewis. Mr. Overton has been at all times and still is the president of Vita-Food Corporation. Mr. Lewis is now, and was during the pertinent period, the treasurer. When he left the office of vice-president, a Mr. Wiseman became vice-president. Mr. Wiseman was succeeded as the vice-president by a Mr. McBride in 1942 or 1943. Mr. McBride is now the vice-president of Vita-Food Corporation. Mr. Lewis became a first director, so to speak, and the managing director of the Vita-Food Corporation after this agreement of

(Testimony of Arthur Hanisch.)

May 5, 1941, and operated in that capacity during the entire time pertinent to this case.

The Court: Is that stipulated?

Mr. Mackay: Yes, ma'am.

Q. (By Mr. Mackay): Now, Mr. Hanisch, do you have a correction to make on the statement you gave the Court?

A. Regarding the officers, I was in error. [51]

Q. Officers of whom?

A. Of both corporations.

Q. Now, what were they, the Stuart Company?

A. The officers of the Stuart Company were as follows: Donald Hops was president, Eloise Johnson was vice-president, Robert H. Dunlap was secretary and treasurer.

The Shaler Food Products officers were as follows: I was the president, Mr. Lewis—Mr. M. H. Lewis—was vice-president, Mrs. Arthur Hanisch, my wife, was secretary, and Robert H. Dunlap was assistant secretary. Mrs. Hanisch was secretary and treasurer.

Q. Now, do I understand you to say that you put in a thousand dollars, in the Stuart Company for all of its stock? A. That is right.

Q. Now, then, what did you do with the stock?

A. I gave it to the other individuals.

Q. How much?

A. I gave the ownership as follows: Hanisch, 600 shares; Pringle, 200 shares; Lewis, 150 shares; Pelletier, 50 shares. That was in each corporation.

Q. In each corporation; I see.

(Testimony of Arthur Hanisch.)

Mr. Mackay: I think, your Honor, that that pretty well covers the basic situation.

Q. (By Mr. Mackay): May I ask you again, have you ever at any time owned any stock in the Vita-Food Corporation? [52] A. No.

Q. Has either one of the corporations, the Stuart Company or the Shaler Company, ever owned any stock? A. No.

Q. Now, Mr. Hanisch, what is the nature of the business of the Stuart Company?

A. It is the distribution of vitamin products to the public through what is known as ethical channels, that is, using the medium of detailing doctors.

Q. Now, I think you stated that the Stuart Company and the Shaler Food Products Company were organized in March, 1941. A. That is correct.

Q. Now, prior to that time were you engaged in any business connected with the distribution and sale of vitamins? A. No.

Q. Will you tell the Court how you became interested in that business?

A. I had been ill. I had been in various tuberculosis sanatoria and in hospitals for a matter of five years, and after 1937 I was able to be up. I had a period of two or three years of convalescence. I had expressed a desire to live out here. I wanted something to do to justify my existence out here, and I told Mr. Pringle, a very good friend of mine, that if he ever found anything that might give me an interesting reason out here, to bring it to me. It was as a result of that [53] conversation that

(Testimony of Arthur Hanisch.)

he originally made me aware of the Vita-Food Corporation and its products.

Q. Did you ever meet Mr. Borsook of the California Institute of Technology?

A. Dr. Borsook?

Q. Yes. A. Yes.

Q. When did you meet him?

A. As I recall it, it was in December of 1940. I am not completely sure. It was either December, or January of 1941.

Q. Did you discuss with him the advantages of the Vita-Food products distribution?

A. Yes.

Mr. Maiden: If the Court please, I object to that as being a leading question. I think Mr. Hanisch should be permitted——

Mr. Mackay: I will withdraw that.

Q. (By Mr. Mackay): Will you please state what conversations you had with Dr. Borsook at that time?

A. Yes. The introduction to Dr. Borsook was arranged by Charles King, a Pasadena Post reporter. I had a luncheon meeting with them in which they told me they were interested—when I say “they” I refer to Dr. Borsook and Mr. Lewis—that they were interested in correcting what they thought was a bad [54] situation in the vitamin field, in that the prices were so high that the average consuming public could not afford to buy them. Dr. Borsook was very much impressed with the complete need of vitamins for everyone. He felt

(Testimony of Arthur Hanisch.)

that there was a terrific vitamin deficiency in practically every individual in the country, and he was very much interested in getting a product to the public at the lowest possible price. In other words, his semi-slogan was, "The greatest number of vitamins to the greatest number of people at the lowest possible price."

The Court: What was the relation of Dr. Borsook to the Vita-Food Corporation, please?

Q. (By Mr. Mackay): Can you tell that?

A. Yes. Dr. Borsook was presented to me as having—and he told me that, and he referred to it as "he and his boys at the California Institute of Technology"—had perfected a new process for the production of vitamins which would greatly bring down the cost from the best known product existing on the coast at that time, which was a product called Galen B, and he wanted to have an association with somebody who was willing to merchandise in a manner consistent with what his expressed policy was, that is, they were to take a very nominal profit, and he wanted to be associated with somebody on the distribution end who would be willing to do that, but he did not want to be associated with somebody that was primarily in [55] the thing to make a lot of money, because he told me that he honestly felt that we could accomplish a great deal of good if we both worked together on that general policy.

Q. When were you introduced to Mr. Lewis?

A. The same——

(Testimony of Arthur Hanisch.)

The Court: That doesn't answer the question.

Mr. Mackay: I am sorry.

The Court: As far as I can see, a lot of this is immaterial. Vita-Food Corporation apparently had something that it made the subject of a contract with the Stuart Company.

Mr. Mackay: Yes, your Honor, I was just——

The Court: And whether Dr. Borsook sold something to the Vita-Food Company to use, I don't know. Whether Dr. Borsook was on the pay roll or staff of the Vita-Food Company or not, I don't know. Dr. Borsook, as far as I have heard, is nothing more than an interesting figure who had done some research in vitamins, and Mr. Hanisch talked to him.

The Witness: I am sorry, your Honor. I can answer that, I think, and explain.

Mr. Mackay: Will you, please.

The Court: I wish you would direct the witness, please, and proceed with questions and answers.

Q. (By Mr. Mackay): Will you, please, explain how that was presented to you by Dr. Borsook? [56]

A. Dr. Borsook said that he and his boys at the California Institute of Technology——

The Court: I don't think you get my point, Mr. Mackay. I will ask you this: Will you please ask the witness whether Dr. Borsook sold anything for Vita-Food products, or did Vita-Food products buy anything from Dr. Borsook?

Mr. Mackay: If your Honor please, I may state this, that Dr. Borsook did not sell any products to

(Testimony of Arthur Hanisch.)

the Vita-Food, but, as I understand the story that I am trying to develop, Dr. Borsook, after talking to Mr. Hanisch about the need for vitamins at a low price, introduced Mr. Hanisch to Mr. Lewis who was representing then The Vita-Food Corporation, and who was in possession of this so-called secret process.

The Court: That is, The Vita-Food Corporation?

Mr. Mackay: Yes, your Honor.

The Court: So Dr. Borsook appears only as a person who served to interest Mr. Hanisch in what the Vita-Food people had, isn't that correct?

Mr. Mackay: Well, it is my understanding that Dr. Borsook and Mr. Lewis were the two that induced Mr. Hanisch to come into this and to sell and distribute the product which had been made by the laboratories of the California Institute of Technology, but was being manufactured then, at that time, by The Vita-Food Corporation.

The Court: Well, that is what I asked you. Does The [57] Vita-Food Corporation have something that Dr. Borsook sold to them or developed, or something else? Now, that question hasn't been answered.

Mr. Mackay: It is my understanding that The Vita-Food Corporation did have—or at least it was represented to Mr. Hanisch that they did have—the process which had been represented to Mr. Hanisch as having been developed in the California Institute of Technology by Dr. Borsook.

(Testimony of Arthur Hanisch.)

The Court: All right.

Mr. Hanisch, did anyone in Vita-Food Corporation represent to you that they had some process that had been developed at the California Institute of Technology?

The Witness: They did not say that they had ownership. However, Dr. Borsook said that he had a great deal of faith in the ability of The Vita-Food Corporation as manufacturers using the process that had been developed at the California Institute of Technology. Therefore——

The Court: All right. Then, isn't this the situation? Someone thought that you might be interested in The Vita-Food Corporation. a process that it had, and some product that it made, and Dr. Borsook told you that he thought it was a reputable concern. He was an authority on vitamins and this company was making vitamins, and he thought that they were reputable. Isn't that the sum and substance of it?

The Witness: That is correct. However, there were [58] certain situations in the contract as it developed, in which Dr. Borsook proceeded to O.K. certain acts on our part, principally the matter of——

The Court: Was he mentioned in the contract, Mr. Mackay?

The Witness: No, he is not.

The Court: Then, if he isn't mentioned in the contract, he is not in the contract.

The Witness: But there was a verbal contract.

(Testimony of Arthur Hanisch.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, what representations were made at that time?

A. The primary representation that was made—there were two primary representations that were made which were of outstanding importance to me: one, I had personally taken the Galen B product. I knew that it was very expensive, that the price was \$4.75 per bottle. They represented that they could produce a bottle, and gave the implication that they had the same type of product, that is, a product primarily from natural sources, which could be sold at half or less than the Galen B product. That was a very important representation to me.

They represented also that they had a unique manner of stabilizing Vitamin A in connection with members of the B-complex. It was presented to me as being a unique way of [59] doing substantially the same thing that Galen B had done, at half the price.

I asked whether they had the patents or whether it was a secret process, and they told me it was a secret process, that they preferred not to go into patents.

I also asked questions—I was trying to get to the meat of the matter—I wondered whether it was labor saving or saving on materials, but I got no answer.

Mr. Maiden: I would like to know whom Mr. Hanisch had these conversations with.

The Witness: Dr. Borsook and Mr. Lewis, and

(Testimony of Arthur Hanisch.)

Mr. Pringle, one of our directors, later on was also present.

Mr. Maiden: Thank you, Mr. Hanisch.

The Court: Would it be a fact, Mr. Hanisch, that a corporation such as The Vita-Food Corporation would be able to use any process developed by the California Institute of Technology?

The Witness: I don't believe as such, and it never was represented to me that it was a development of that institution.

The Court: Well, you so stated a few minutes ago.

The Witness: No, I stated that Dr. Borsook stated it was a development in his laboratory with his boys.

The Court: What do you mean by that?

The Witness: That he had done the work on his own [60] with his own associates.

The Court: It was done in his own laboratory?

The Witness: He did not explain it to me. The way he presented it, I assumed the work had been done at Caltech,

The Court: But it was his personal work, is that right?

The Witness: It was never completely and clearly explained to me, but the impression was that it had the aura of background of California Institute of Technology, developed there, working with his associates.

The Court: Well, for purposes of making findings of fact, Mr. Mackay, I will want to know

(Testimony of Arthur Hanisch.)

whether this was a process developed by Dr. Borsook, said to have been developed by him personally, or a process that was developed somewhere else, but I think this clears up the matter, as I understand it. It is represented that Dr. Borsook had developed some process in his own laboratory with his assistants, and it happened that he was at California Institute of Technology. Of course, from the standpoint of salesmanship, the unaware and unwary might be led into believing that this was something developed by the California Institute of Technology, but for purposes of findings of fact by the Court we would want to be clear about that.

Q. (By Mr. Mackay): Now, Mr. Hanisch, did Dr. Borsook represent to you that he had a private laboratory separate and apart from the [61] Institute?

A. There never was anything definite mentioned about it. The impression was that the work had been, as far as I understood it, done at Caltech.

The Court: But you never found out definitely?

The Witness: There was a vagueness in this whole thing that is difficult for me to describe. In the second place, I never knew where the Vita-Food plant was. I never was able to get a financial statement. There was a great deal of information which was kept very much to The Vita-Food Corporation and Dr. Borsook, which I was not able to get, but I assumed, in talking to Dr. Borsook, I was talking to a man with an academic standing and with a reputation, and I therefore did not go into the

(Testimony of Arthur Hanisch.)

questioning of those details as much as I would in a normal business deal.

Mr. Mackay: We are ready to prove later on, if your Honor please, that this process was not a secret process, and instead of being developed in a laboratory there, it was developed in a bathtub and in a garage. That will come later. I just want to clear up this about the representations that induced Mr. Hanisch to go into this particular endeavor.

Mr. Maiden: In other words, you are going to prove that it was produced in a bathtub, is that right?

Mr. Mackay: Well, it certainly wasn't produced—I may be wrong with respect to a bathtub, but I understand, and [62] we shall later on prove, that it was produced in a kitchen or a garage.

Q. (By Mr. Mackay): Now, Mr. Hanisch, were any representations made at that time with respect to the financial ability of The Vita-Food Corporation?

A. Yes, to this extent: Mr. King, the reporter who brought the deal to me, was at my house, and there were several questions that I wanted him to verify before going into a deal of this nature. One of them was, I would like to have a financial statement from them. They refused to give me that statement, but in a subsequent meeting both Mr. Lewis and Dr. Borsook assured me that The Vita-Food Corporation was financed adequately or sufficiently to the point where they could carry on this

(Testimony of Arthur Hanisch.)

operation, that is, the operation of manufacturing and supplying me with the amount of material that I would need.

Q. Well, now, at that time was there any conversation with respect to whether or not you could advertise this formula or product produced by this formula as a product of the California Institute of Technology?

A. There was conversation on that point.

Q. What was it?

A. We realized—or I realized—the value of being able to tie up a product and to give it the aura of respectability that a tie-up with an institution like the California [63] Institute of Technology would give us. However, this was a verbal understanding, it was never reduced to writing, that our men—we don't have salesmen in the normal sense of the word; we call the men who call on doctors "detail men"—our men had Dr. Borsook's permission to use his name in connection with it verbally. However, we were never allowed to use it in any literature we sent to the doctors.

Q. Do you know whether that was because of the policy of the Institute?

A. I don't know. It was simply as a result of my conversations with Dr. Borsook and Mr. Lewis.

The Court: Do I understand from this testimony, Mr. Hanisch, that your detail men then did represent to doctors orally that the formula had been developed by the Institute of Technology?

(Testimony of Arthur Hanisch.)

The Witness: In connection with work at the California Institute of Technology, yes; that is correct.

Q. (By Mr. Mackay): Now, as a result of these conferences with Dr. Borsook and Mr. Lewis, representing The Vita-Food Corporation, did you enter in a contract with them?

A. Prior to the contract I purchased two lots of merchandise from The Vita-Food Corporation, one purchase of 3,000 gallons was made in February of 1941, and one lot of 3,000 gallons was purchased in March of 1941. This was prior, of [64] course, to the contract.

Q. Now, as a result of these conversations with Dr. Borsook and Mr. Lewis, did you form two corporations? A. I did.

Q. What were their names?

A. The Shaler Food Products Company and The Stuart Company.

Q. Subsequent to that time, did these two corporations enter in to a contract with The Vita-Food Corporation? A. We did, on May 5, 1941.

Q. I show you an original contract and ask you to state whether or not that is the original contract.

A. The date is May 5th, that is my signature; that is it.

Mr. Mackay: If your Honor please, I should like, with counsel's permission, to substitute a copy of this for the original.

Mr. Maiden: That will be agreeable.

(Testimony of Arthur Hanisch.)

Mr. Mackay: And have it marked as Exhibit next in order.

The Court: It is received as Petitioner's Exhibit 8.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 8.)

The Court: What is the date of the contract?

Mr. Mackay: It is May 5, 1941.

The Court: That was the first contract? [65]

Mr. Mackay: Yes, your Honor.

I would like at this time, if your Honor please, to call your attention to a preamble in the contract which I think is quite important:

“Whereas, second party”——

and the second party at that time was The Vita-Food Corporation——

“has undertaken to make available to a large number of people vitamin food concentrates which have heretofore been unobtainable by them on account of high prices, and desires to produce such food concentrates of high standard at prices lower than heretofore offered in this country, and first and third parties are in accord with second party in the view of the desirability of accomplishing this purpose to the end that the nutritional standards now prevailing in this country may be greatly improved.”

(Testimony of Arthur Hanisch.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, will you state whether or not you had any understanding, verbal or otherwise, with Mr. Lewis and Dr. Borsook with respect to assisting the California Institute of Technology with any profits or any money? A. Yes, I did.

Q. Will you please state to the Court what that was?

A. In light of their expressed desire to further the [66] work in research in a nutritional field, they had expressed this desire to take purely reasonable profits, and they asked me to do the same thing, and I told them that I was enough interested in the thing that they were trying to accomplish, that when, as, and if my corporations made money as a result of this venture, I would be glad to give 10 to 15 per cent of any profits we made to the Institute to further that type of research.

The Court: This was just an oral conversation?

Mr. Mackay: That is right.

The Witness: This was just a conversation.

Q. (By Mr. Mackay): Now, Mr. Hanisch, after the contract—may I ask this: Will you please tell the Court why you organized the two corporations?

A. Yes. We had a very definite reason for that. It may sound complicated and it may take me a little time, but I want to go into it quite thoroughly because it had a definite reason.

We decided to form two corporations for this reason: Dr. Borsook was convinced that the cheap-

(Testimony of Arthur Hanisch.)

est possible way to get merchandise to the consuming public was through grocery channels, in which your wholesale and retail mark-ups are known to be lower than they are in the drug field. He therefore felt that, given a cost of manufacturer, put them through the grocery [67] wholesalers and the grocery retailers, the consuming public eventually would buy the product on a much cheaper basis than if they went through the drug field. However, we were not completely sure that that was the approach, because we felt that it might involve missionary work in revising people's buying habits. In other words, an average individual who buys drugs or anything for health is accustomed to go into the drugstore, and we felt that it might be difficult to reconvert people's buying habits and sell a pharmaceutical product in a grocery store. For that reason I formed two corporations to make a complete test on which was the right procedure.

I formed the Shaler Food Products Company, which was organized to merchandise purely through the grocery field. I formed The Stuart Company, which was formed to merchandise through the drug field. I ran them as separate corporations.

The reason that you see our officers are different, they were deliberate dummies, because I wanted to make a cold test without prejudicing the doctor **against** The Stuart Company. I didn't want that identity revealed.

Q. Did the Shaler Food Products Company

(Testimony of Arthur Hanisch.)

undertake the distribution and sale of vitamin products? A. It did.

Q. How long did it continue?

A. We started operating and making actual sales either in May or June. I don't remember exactly when we got the first [68] order, but it was substantially that time.

Q. Under what name?

A. Under the—we first, in the contract you will notice that we use the name “Vitaplex.” However, it was found that it interfered with a name that William T. Thompson owned, and we eventually changed the name to “Calplex.” The reason for the “Cal” in there was to give it the California Institute of Technology connotation as nearly as we dared to go, and it was deliberate.

Q. Now, how long did the Shaler Food Products Company continue?

A. The Shaler Food Products started operating, as I told you, in May and June. We originally thought that we could get doctors to prescribe and send patients to grocery stores for the product. We found that that could not be done. We changed our whole procedure and put it out as what is known as a consumer advertising item. In other words, advertising to the consumer through the medium of the newspapers and so forth. The thing never was successful.

Q. When did you discontinue the Shaler Food Products Company?

(Testimony of Arthur Hanisch.)

A. We merged it in with the Shaler Foods Company in June, 1942.

The Court: What do you mean by "We"?

Mr. Mackay: Well, I understand that— [69]

Q. (By Mr. Mackay): Can you tell the Court what you mean?

A. I think I can. There was business still coming in on Shaler. We had established contacts with some people who still asked for it. We wanted to continue that business in some form of structure. We did not, however, want to run a separate business, so we took the stock of the Shaler corporation and merged it into the corporate structure of The Stuart Company.

Q. And discontinued the Shaler Food Products Company altogether? A. As a company.

The Court: Who acquired the stock of the Shaler Company, the individual stockholders of The Stuart Company or The Stuart Company?

The Witness: Yes. At that time we doubled our stock, and The Stuart Company had 2,000 shares then, instead of 1,000, and the stock ownership remained the same, that is, percentagewise, except that they had it all in 2,000 shares of Stuart instead of having it 1,000 in Shaler and 1,000 in Stuart.

Mr. Mackay: I intended to put that on with another witness. I can go into it further, but, as I understand it, the Stuart Company had increased its capital situation and had issued stock for the assets of the Shaler Company, and then the [70]

(Testimony of Arthur Hanisch.)

Shaler Company was dissolved. That is what I understand.

Q. (By Mr. Mackay): Now, Mr. Hanisch, does The Stuart Company, that is, the name of this petitioner—where did you get that?

A. The name of "Stuart" in the company?

Q. Yes.

A. I could explain that this way: I wanted a personal name of some kind in the title of the corporation. I therefore—to be very frank about it, the name "Hanisch" I would have used except that is a difficult one to spell, and really had a German connotation at the start of the impending war. I therefore, instead of using my last name, took the first names of my two sons. The oldest is "Shaler," and we gave that to the Shaler Company. My younger son is "Stuart," and we called that company The Stuart Company.

Q. Now, how did the so-called "Stuart formula" get the word "Stuart" in there?

A. Because it was the name of our corporation.

Q. And also the name of your son?

A. That is right.

Q. At the time this contract of May 5, 1941, was entered into, as far as you know had any application been made for the registration of the so-called trade mark, "the Stuart formula"?

A. I was told by the individuals involved that it would be made, and it also stated in the contract that application [71] would be made.

Q. Yes. Now, will you please tell the Court

(Testimony of Arthur Hanisch.)

the manner and method that you used in distributing and selling—that is, I am speaking of the manner and method that The Stuart Company used in distributing and selling—this product?

A. Our method of operation in The Stuart Company has always been what is known as the ethical approach to the ultimate consumer. In other words, we do not have salesmen in the strict sense of the word. We hire men who have training to call on doctors to present our products to the doctors. The doctor in turn prescribes the product to his patients, and that is what is known as the ethical operation. The term is used, I think, primarily because one thing that is considered very unethical in that field is to make a direct approach in an advertising way to the ultimate consumer. It must all come through the doctor.

Q. May I ask you, did you advertise this so-called Stuart product?

A. To the ultimate consumer?

Q. Yes. A. Never.

Q. What did your advertisements consist of?

A. Our advertising consisted of sampling to the doctors, that is, actual samples of our product and literature sent to the doctors. [72]

The Court: From what the witness said a short time ago, they did advertise in the newspapers?

Mr. Mackay: We will clear that up now.

Q. (By Mr. Mackay): What kind of advertising did you do with respect to the Shaler Company?

A. With the Shaler Company we went directly

(Testimony of Arthur Hanisch.)

to the consumer and hit the consumer approach on that operation.

The Court: The product had the same name?

The Witness: The product did not have the same name. The product in the grocery field was "Calplex," and the product through the drug field was known as "the Stuart formula."

Q. (By Mr. Mackay): Well, was it the same product sold under two different names?

A. No, it was the same type of product. However, the vitamin potency, the unitage was different. In other words, the grocery product was a cheaper item. The reason for that being, your Honor, that in the grocery field, when you go beyond a price of 50 to 75 cents, you are out of bounds for their type of trade, and they don't like a product that is higher priced than that.

Q. Now, this agreement, the May 5, 1941, agreement, I think that agreement required The Stuart Company to buy all of its products from The Vita-Food Corporation? [73]

A. That is true.

Q. And also that the prices for the purchases of those products were set forth in the contract?

A. That is right.

Q. The contract also provided for the price at which The Stuart Company could retail, is that right?

A. We had to have the approval of The Vita-Food Corporation to change our retail price. However, there was a provision which would allow us to raise in case the cost of the Vita-Food product to

(Testimony of Arthur Hanisch.)

us went up. There was no provision, though, that would take care of any increased expenses that The Stuart Company might have. In other words, that was not provided for. There was an automatic provision in the contract that if the Vita-Food product had to be raised because of increased cost, we could raise or increase the cost proportionately.

The Court: What contract was that covered in?

The Witness: The contract of May 5, 1941.

The Court: What is the clause in there?

The Witness: I haven't it here, your Honor.

Mr. Mackay: Here it is, your Honor, Exhibit 8.

The Court: What clause in the agreement refers to the maintenance of a retail price?

Mr. Mackay: I think it is on page 3, clause 5. I shall read it now. I am on page 3, paragraph 2:

"The Stuart Company, one of the first parties, [71] agrees that the concentrate received by it under said contract of March 7, 1941, will be sold and distributed under second party's trade mark or label, The Stuart Formula, and/or under such other of second party's trade marks or labels as may be mutually agreed upon by first and second parties, to retail at \$1.95 per pint bottle plus any applicable sales tax."

The paragraph following that relates to the Shaler Food Products Company.

The Court: That is probably sufficient.

Mr. Mackay, what did The Stuart Company and

(Testimony of Arthur Hanisch.)

the Shaler Food Products Company do with respect to their label? They had a name that they were going to use in the resale and marketing of this product. Now, as I understand it, the product was made by The Vita-Food Corporation, and Shaler and Stuart were to resell the product under their own label, and they adopted the name "the Stuart formula," and they adopted another name, "Vita-plex," which was later changed to "Calplex." Now, did they register these names anywhere? They refer here in the agreement to the second party's trade marks or labels. Now, which was it, was it a label or a trade mark, as a matter of law?

Mr. Mackay: As I understand, at the time this contract was entered into, as far as The Stuart Formula was concerned, [75] which is the main thing here, there was no trade mark, no application had been made; but I understand that The Vita-Food Corporation—that is what I intend to bring out with this witness—manufactured the product, that the labels were procured by The Stuart Company and placed on that with the Stuart name on it——

The Witness: That is not correct. We did not place the labels on. The labels were placed on by The Vita-Food Company.

Q. (By Mr. Mackay): Who prepared the labels?

A. We did it together. We discussed the various statements to be made. On the technical, we were

(Testimony of Arthur Hanisch.)

guided by what Dr. Borsook and Mr. Lewis advised on the thing.

The Court: Well, up until the end of this arrangement, did The Stuart Company ever get a trade mark?

Mr. Mackay: No, your Honor.

The Court: All right.

Is that true, Mr. Hanisch?

The Witness: That is true.

Mr. Mackay: Except as I stated in my opening statement, that in the contract of settlement there was a dispute at that particular time. The Stuart Company had been advised by reputable patent counsel that the trade mark which had been registered by The Vita-Food Corporation, "The Stuart formula," [76] was invalid because of misrepresentation, and in the agreement——

The Court: Well, that has to do with Vita-Food. My question was whether either Shaler or Stuart had a trade mark or trade marks.

Mr. Mackay: No, except I want to explain this: In the agreement of November 28, 1942, which has not been introduced in evidence, Vita-Food quit whatever interest they had in the trade mark.

The Court: You are talking about a trade mark that Vita-Food got, aren't you?

Mr. Mackay: Yes.

Mr. Maiden: Your Honor, I want to make it clear at this point, and I don't think it is clear, from a statement made by your Honor, under this paragraph 2 in Petitioner's Exhibit 8, the second

(Testimony of Arthur Hanisch.)

party referred to there is The Vita-Food Corporation, and it states here that this trade mark or label, "the Stuart formula," is the property of the second party, which is The Vita-Food Corporation.

Mr. Mackay: Yes, I appreciate that, your Honor, and I will ask this witness if at the time—I think he has answered it once before—if at the time this contract was signed there was a trade mark, "the Stuart formula."

The Witness: There was not.

Q. (By Mr. Mackay): Now, in selling this product which The Stuart Company [77] purchased from The Vita-Food Corporation, was any label, correspondence or literature disclosing that The Vita-Food Corporation was the manufacturer, ever used?

A. You mean, did we ever use anything disclosing that?

Q. Yes. A. We did not.

Q. You did not. Now, I will ask you if these are the labels that were used in the sale of the products, Mr. Hanisch.

A. This is the label indicated "A" which was used in the sale of the product prior to the cancellation agreement. The one marked "B" is the revision we made after the agreement of November 28th.

Q. Now, that is just the front part of the label?

A. These two exhibits (indicating) are the front part, and these (indicating) are the back part.

Q. What I have in mind, is the back part.

(Testimony of Arthur Hanisch.)

A. That is right.

Mr. Mackay: If your Honor please, I should like to offer these in evidence.

Mr. Maiden: No objection, if the Court please.

Mr. Mackay: I think, if we could pin these other labels on here, or paste them on there—I should like to offer those in evidence, if your Honor please, and we will get some mucilage later.

The Court: Without objection, this is received as [78] Petitioner's Exhibit 9.

(The documents above-referred to were received in evidence and marked Petitioner's Exhibit No. 9.)

Q. (By Mr. Mackay): Now, were all the products that were sold by The Stuart Company from May 5, 1941, to the termination agreement or cancellation agreement of November 28, 1941, sold under these labels which have just been presented to the Court in evidence?

A. That is not completely true for this reason: According to the contract we had a right to sell a product manufactured by The Vita-Food Corporation, known as "Vitall," outside of Los Angeles County. We also had the right to sell a product which had been sold by Mr. King, "Buoyant B." We also sold a product, calcium-pantothenate. That was called, "The Stuart Calcium-pantothenate."

Q. Now, you stated that The Stuart Company had the right to sell Vitall outside the City of Los Angeles?

(Testimony of Arthur Hanisch.)

A. Yes, with the provision when, as, and if our sales got up to 2,000 pints a day, we would take over the distribution of Vitall even in Los Angeles.

Q. Who was selling Vitall in Los Angeles?

A. The Vita-Food Corporation itself.

Q. I think, Mr. Hanisch, you stated a while ago that it was represented to you that they had a process through which a [79] stable product could be developed. Will you please explain to the Court what you mean by "a stable product"?

A. Well, please understand that I am not a technical man. However, one of the **important** things in a pharmaceutical operation is to be certain that you meet all the requirements of the Food and Drug Administration, and one of their primary requirements means that you must not have misbranding. In other words, your product must contain the unitage of the various vitamin factors that are stated on the label. It is known that in the vitamin field there is some loss of unitage, some factors lose unitage faster than others. The business of making a stable product is one that will have what the trade considers a reasonable shelf life, say, maybe, a year and a half to two years shelf life, without loss of unitage below the allowance given by the Food and Drug Administration, which is 10 per cent below the label claim. They do have a tolerance point there of 10 per cent.

Q. Well, now, I will ask you, did the product that you purchased from The Vita-Food Corporation during the period that we have here discussed,

(Testimony of Arthur Hanisch.)

from May 5, 1941, to November 28, 1942, whether or not that product had any defects? A. Yes.

Q. Will you please tell the Court what you found, and when?

A. It had several defects. One, there was a thing that [80] was known as separation. In other words, it wasn't a complete mixture. There would be one level of materials and then another level of materials. That was not the primary fault, however. The primary fault was—and we found out—that the nature of molasses—this particular product had a molasses base—the nature of molasses is such that it is almost impossible to keep it from fermenting. We had bottles explode in doctors' offices and drugstore windows and in our own office, and it was a very serious fault. To overcome that, the manufacturer—oh, he gave me several reasons—

Q. Now, "the manufacturer"—you mean Vita-Foods?

A. Vita-Foods. I brought it to his attention constantly during the life——

The Court: When did you first discover this?

The Witness: Very shortly after we started operating.

The Court: You say "very shortly." What do you mean?

The Witness: I would say within a month or two.

The Court: Was this the first time this product had ever been put on the market?

The Witness: By The Stuart Company, yes.

(Testimony of Arthur Hanisch.)

The Court: No, I mean by anybody.

The Witness: I don't know how long The Vita-Food Corporation had been marketing Vitall. They did have Vitall on the market.

The Court: Vitall is what blew up, is that right? [81]

The Witness: No. Vitall is similar to the Stuart product.

The Court: Vitall blew up?

The Witness: The Stuart product blew up.

The Court: The stuff that was called "The Stuart Formula" fermented?

The Witness: That is right. Now, that caused two things——

The Court: Well, now, you will assume that the Court is in the position of a reasonable person, and it would seem that if this were not the first time that "The Stuart Formula" had been made, someone would have discovered long before you that it would ferment and that the bottles would pop.

The Witness: We, of course, only had the experience of buying it and getting delivery, I think, from April until the first blow-ups happened, which was probably a month or two later.

The Court: Had they been selling this stuff they called "The Stuart Formula" to anybody before they sold it to you?

The Witness: They had sold a similar product using the same base under a brand name "Vitall," and another one under the trade name that Charley King developed, called "Buoyant B."

Shall I amplify that further? [82]

(Testimony of Arthur Hanisch.)

Mr. Mackay: I wish you would, please.

The Court: You never heard of any of these defects before?

The Witness: No, never had. It was represented to me that they knew how to make this product and have it be a satisfactory, merchandisable product.

Now, I called these various blow-ups and all the other faults that we found to the attention of The Vita-Food Corporation. They assured me that they could eliminate the defects. We found out—and this went on almost constantly, because I was very much frightened to put out that type of product. Now, naturally, if a product ferments to the point where it will explode the bottle, it is liable to cause digestive distress to a lot of people who take it, and we found there were a lot of people who could not tolerate the product for that reason.

There also was a molasses base——

The Court: I can think of other things that might happen if it fermented, too.

The Witness: Well, you can understand my feeling in that matter too. I was very much concerned, and I repeatedly asked them to overcome this fault. They assured me they would. I found out one way they tried to correct it. They put a vent in the cap of the bottle so that, instead of exploding the bottle, it would run over the sides, and we had labels ruined [83] all over the place as a result of that. Naturally, it destroyed my confidence in the ability of that manufacturer.

Q. (By Mr. Mackay): Well, now, Mr. Hanisch, did you ever see a letter from The Vita-Food Cor-

(Testimony of Arthur Hanisch.)

poration with respect to the explosion of these products?

A. Yes, I have a letter here of October 15, 1941, signed by M. H. Lewis, treasurer of The Vita-Food Corporation, saying this:

“Referring to your request for extension of time in which to comply with the quota requirements set out in the contract between ourselves of date May 5, 1941, and our several conversations relative thereto—we appreciate that you have been and may be put to a certain inconvenience and expense on account of frothing and breakage of Calplex and Stuart Formula bottles, and as an offset, we are agreeable that the contract referred to be amended by extending for a period of 60 days the time for the performance of the specified quota requirements.

“If this arrangement is satisfactory to you, please signify your consent thereto by signing in the place indicated and returning the enclosed copy of this letter.”

Mr. Maiden: Mr. Mackay, are you going to put that in [84] evidence?

Mr. Mackay: Yes, if you want. It has already been read in.

Mr. Maiden: He didn't read it all.

The Court: It is received as Exhibit No. 10.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 10.)

(Testimony of Arthur Hanisch.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, you stated a while ago about the representations made with respect to the secret—well, let's first—with respect to the development of that product, will you please tell the Court whether, subsequent to the execution of the contract of May 5, 1941, you discovered that those representations were not correct.

A. Yes.

Q. And if so, in what manner?

A. I did not discover it personally. Mr. Dunlap and two representatives of our company had a long conversation with Dr. Ellis, who was one of the men who worked on the development of this product with Dr. Borsook. He told them that it was not a fact that it had been developed there, but that it was developed at his home, and he had been a part of it.

Mr. Maiden: Just a minute——

The Witness: He also stated——

Mr. Maiden: Just a minute. Are you repeating the [85] statement of a witness that was made to you personally?

The Witness: That is right. He asked me when I had become aware, and I became aware through my attorney, Mr. Dunlap. I was not in the conversation with them personally.

Mr. Maiden: In other words, the only way you know what Dr. Ellis said would be hearsay, what someone else told you?

The Witness: Well, I don't know technically.

Mr. Maiden: I object on the ground it is hear-

(Testimony of Arthur Hanisch.)

say and ask that the answer be stricken from the record.

The Court: The objection is sustained.

I think we had better recess for lunch, Mr. Mackay.

Mr. Mackay: I think that is a good idea.

The Court: We will recess at this time until 2:10.

(Whereupon, at 12:45 p.m., a recess was taken until 2:10 p.m. of the same day.) [86]

Afternoon Session, 2:10 P.M.

The Court: Proceed.

Mr. Hanisch, will you take the stand again, please?

Whereupon,

ARTHUR HANISCH

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Mackay:

Q. Mr. Hanisch, calling your attention to Exhibit 8, which is a contract dated May 5, 1941, and particularly to paragraph 6 on page 5, I will ask you to please read that. I think that paragraph relates to the minimum quota that your company was obligated to sell during the years involved.

(Testimony of Arthur Hanisch.)

A. Shall I read it?

Q. Yes. A. (Reading).

“First party shall have the exclusive right to sell said Vitaplex and Stuart Formula until November 1, 1941, *shall* right shall continue thereafter until and unless terminated by written notice from second party, provided, however, that such termination shall not become effective until and unless during any 60-day period between said [87] November 1, 1941, and May 1, 1942, the combined purchases of such products by first parties from second party shall not have averaged 1,500 pints per day, or unless during any 60-day period after said May 1, 1942, such purchases shall not have averaged 2,000 pints per day; and provided further, the date of any such termination shall be not less than 60 days from and after such notice of termination of said right.”

Q. Now, Mr. Hanisch, do you know how that quota was set? A. Yes.

Q. Will you please tell the Court?

A. We had conversations. We had decided there should be such a factor to protect The Vita-Food Corporation interests, in that they wanted to see us do a good job of merchandising. I was told figures on Vitall sales, which I learned later were not correct. I also was told figures on the sales of Galen B. which was the outstanding product on the coast, which I also learned were not correct.

Now, the quota was set unrealistically high be-

(Testimony of Arthur Hanisch.)

cause of those facts, and a thing which made it very impossible to even approach attainment of that quota was the faultiness of the product itself, as indicated by a letter of extension I got, releasing me from the quota for a period of time.

Q. When did you get that release? [88]

A. That was approximately October. We subsequently got another release from the quota restrictions, the following February.

Q. Is that February, 1942?

A. Correct, and also another release, I think it was May of 1942, but we never came close to attaining those quotas.

Q. What would your sales have to have been in dollars to have met that quota?

A. Shall I make that approximate?

Q. I mean approximate.

A. The final quota which we would have had to have reached by May of 1942, at 2,000 bottles a day, would be \$50,000.00 a month. They would have had to reach approximately \$75,000.00 per month.

Q. Now, did you have any disputes with The Vita-Food Corporation or Mr. Lewis with respect to the maintenance of that quota during particularly the spring and fall of 1942?

A. No, we just told him it was impossible of attainment, and it was unrealistic, and I was constantly worried about this factor of the contract because I realized at sometime they could step in and

(Testimony of Arthur Hanisch.)

exercise their right to cancel on the basis of that failure to meet that quota.

Q. Now, Mr. Hanisch, I call your attention to Exhibit 1 for the period ending March 31, 1942, which discloses a loss of \$6,462.14, and also Exhibit 2, which is for the fiscal year [89] ending March 31, 1943, which discloses a loss of \$962.80. Now, I will ask you, Mr. Hanisch, keeping in mind the sales that you made, why the company could not make a profit.

A. I didn't get your question. You asked me why we did not make a profit?

Q. Yes.

A. Because the prices as given to us were unrealistically high in light of the fact that our retailing price was set by The Vita-Food Corporation.

Q. In other words, the purchase price of the product to you was set by the contract?

A. That is correct.

Q. The Vita-Food had a right to set the retail price, too?

A. That is correct. Normally, in a business situation, if you find that you can't make money on a certain retail price structure, you have the latitude to do what you want to, either raise your price or get a lower cost from the man supplying you. I was stymied on both points as a result of this contract.

Q. Did you make any complaints to The Vita-Food Corporation with respect to the purchase price as well as the retail price?

(Testimony of Arthur Hanisch.)

A. We did, several times. As a matter of fact, our original price as you see it in this contract was \$1.95. We [90] asked for relief. Under that it was subsequently raised to \$2.05. We again found we couldn't adequately pay our people working for us, and we certainly couldn't make a profit if we couldn't pay those people adequately. We again went to Dr. Borsook—or Mr. Lauerhass, who was managing my office, I asked him to go to Dr. Borsook and ask for relief. I was told that I couldn't get it because it would be breaking faith with our public. Mr. Lauerhass asked the question, "Do you want to keep faith with the public at the expense of having the employees at The Stuart Company underpaid?" I called him and told him that if I couldn't get a price raise, that I was through, I could not continue to operate. Within a half-hour, he apparently called back and said the raise to \$2.30 had been granted.

Q. Now, did you explain to him about the cost to you of the product from The Vita-Food Company?

A. Oh, yes, constantly, because I could see, the way this thing was going, it was impossible to make any money with that price structure.

Q. Did you make an investigation in the fall of 1942 with respect to the availability of vitamins at a lower price?

A. In 1942?

Q. Yes.

A. I did not until 1942. I meticulously stuck to the contract, which was not even discussing prices

(Testimony of Arthur Hanisch.)

with anybody, [91] until my suspicions had been aroused on other points. A representative of the Merck Chemical Company came in to see me, and he said, "I can get you calcium-pantothenate tablets for"—and he told me what I could get them for, and he told me the people who could make them for me. He told me I was paying just about twice what I could get them for in the open market.

Q. Did you make an investigation by other companies as to whether or not you could buy the vitamin product, the ingredients for it, at that time?

A. Yes. I got in touch with Mr. Ken Miles, who was the sales manager of the William T. Thompson Company. I asked him whether he could make our product and what the price would be. He did not give me a definite quotation, but he said, "Approximately 60 per cent of what you are paying for the product at the present time."

Q. Did you also make an investigation of other manufacturers?

A. Yes, I did. The day after I talked to Mr. Miles, through Mr. Miles a Mr. Strate, vice-president of the Strong-Cobb Company of Cleveland, came in to see me, and I asked him the same question. He told me that they could not only duplicate our product, but give us an improved product, and again he gave me a figure of approximately 60 per cent of the price I was paying, which was verified in a formal quotation from the president of the company a short time later. [92]

(Testimony of Arthur Hanisch.)

Q. In letter form? A. In letter form.

Q. I show you a letter dated October 6, 1942, and ask you to please identify it.

A. You mean identify it?

Q. Who is it from?

A. It is from Strong-Cobb Company, Cleveland, Ohio.

Q. To The Stuart Company?

A. Yes, and it is signed by Dean MacAusland, sales department.

Q. Is this quotation you referred to as having been given to you in writing?

A. That is correct.

Mr. Mackay: I offer this in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: It is received as Exhibit 11.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 11.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, I think you stated this morning that at the time you made—just about the time or a little before you were making this contract of May 5, 1941, that Mr. Lewis had represented that his company was financially able to manufacture and carry on?

A. Yes. [93]

Q. I will ask if you subsequently found out anything contrary to that.

A. Yes, I did.

(Testimony of Arthur Hanisch.)

Q. Will you please state when and what the situation was?

A. Well, within a very few months after the contract was signed, a Mr. Pierce, who is either a wholesaler or represents the Owens-Illinois Bottle Company, called me up and asked whether I would guarantee the Vita-Food account, and he at that time stated that they would not sell Vita-Food unless I did guarantee it, and I did guarantee it. I called him up yesterday to verify that, and that is Mr. Pierce's understanding, they were working on the assumption that I guaranteed that account.

Mr. Maiden: I object to that as hearsay and ask that it be stricken from the record, his statement of what he was advised yesterday by a certain party with respect to any guarantees. It is absolutely pure hearsay.

The Witness: I was asked whether I would guarantee it, by Mr. Pierce, and I did.

Mr. Mackay: I think the witness can say he was asked to guarantee it.

The Court: It would sound to me like a very strange statement. A guarantee is one of the very firmest and severest legal responsibilities that anyone can take. If Mr. Hanisch [94] says that someone called up on the phone and asked him to guarantee someone's account, it wouldn't mean anything to me as a lawyer. I wouldn't give it any weight even though I took a liberal view about Mr. Hanisch's testimony. Guarantee what?

(Testimony of Arthur Hanisch.)

Now, the objection is sustained. If you want to prove that Mr. Hanisch entered into any guarantees for anybody else's account, you will have to be a lot more specific about it than that.

Mr. Mackay: May I make this observation, your Honor. I didn't intend to prove that Mr. Hanisch had guaranteed it. I am trying to develop that the representations of the financial ability of the Vita-Food Corporation in the beginning—that it was not as represented. In fact, one of his dealers who was selling the Vita-Food Corporation a product had asked Mr. Hanisch if he would guarantee the Vita-Food account, which would indicate, of course, that the Vita-Food Corporation was not financially responsible.

The Court: Well, it is not sufficient, Mr. Mackay. I would have to sustain that objection.

The Witness: There was another—

Q. (By Mr. Mackay): Wait a minute. May I ask you, did you discover subsequently, in any other manner than the manner that you have related, anything which led you to suspect that Vita-Food was not as strong financially as was represented to you when you [95] signed the contract?

A. Yes.

Q. What was it?

A. In about December, 1941—I know it was after war was declared, because that was the reason for this—Mr. Lewis and Dr. Borsook came to me. I had lunch with them, and they asked me whether

(Testimony of Arthur Hanisch.)

I would finance substantial purchases of raw materials for them, that they were not in a position to do it, and they were afraid there would be a shortage in the market because of the war situation. I refused to do that.

The Court: That need not necessarily indicate that they were not in good financial condition.

Mr. Mackay: We are in this position, your Honor—

The Court: If you want to prove, Mr. Mackay, what the balance sheet position of the Vita-Food Corporation was, you would have to prove it. Now a business concern can be solvent and in good condition, and yet carry on its business with a certain volume of goods and desire to purchase a larger volume of goods, and go to someone and say, "In making these larger purchases, we need some more capital. We don't want to go out and borrow it. You are associated with us in business. Will you go in with us on buying a larger quantity of goods?"

Now, that kind of a proposition that Mr. Hanisch testified about isn't proof that anyone is in good or bad financial condition. [96]

Mr. Mackay: I appreciate that, your Honor, and we are just in this position, and we had no access to the financial statements of Vita-Food. I understand that they have their difficulties with Uncle Sam on the other side, who is taking the opposite view that this was not a sin. That is what I assume, and, of course, we have no access to their

(Testimony of Arthur Hanisch.)

books or have any way of proving that, but I am bringing that out for this purpose.

The Court: What do you think is the materiality as to whether or not they were in good financial position? If they were selling a poor product under the contract, that would be one thing, but why do you think it is material whether they were or were not in good financial condition?

Mr. Mackay: Well, I think it was this way: Because the Stuart Company was involved in what we considered to be a very onerous contract, we are just putting in all the evidence we have got here, bit by bit. I think it will shape itself and show the materiality as we go along, because I am leading up pretty soon to show that, as a result of all these things we are talking about, that Mr. Hanisch, the Stuart Company, desired very much, and in fact it was the lifeblood of their business, to get rid of this particular contract.

The Court: They didn't have any other business, did they, except this contract?

Mr. Mackay: No, they were bound by it, and they [97] couldn't do it.

The Court: Just don't depend on that too much, Mr. Mackay. Don't ask the Court to give weight to something that is pretty thin and isn't entitled to very much weight.

Mr. Mackay: I appreciate that.

The Court: Why, your record will get along all right, but the Court isn't going to put as much importance on that kind of proof as you desire.

(Testimony of Arthur Hanisch.)

It may be difficult for you to establish your point, but that is a problem that you must face. Whether it is necessary for you to go into all of that is another matter.

Mr. Mackay: Could I make this observation, your Honor? I think that subsequent testimony will make clear the importance of that. I present it as just one step in the plan here that I have to prove our case, and I am sure that the Court will give it the weight it deserves, and if we don't connect it up, the Court can use its discretion and not use it.

Of course, I may point out this, your Honor, that I think that our evidence will show on that that it is very important here that a distributor such as The Stuart Company, who was distributing goods which were subject to the regulations of the Food and Drug Act, had a responsible supplier of the product. I think it will all tie in as it goes along.

The Court: Mr. Mackay, if you will just be realistic about it. The evidence shows so far there is a new corporation [98] organized, and it is going into business for the distributing of a product. It has no other business, never sold any other product, and, of course, it was subject to certain regulations, but almost every business that is conducted today is subject to some regulations.

Mr. Mackay: That is right.

The Court: In other words, just stick to the facts. You are arguing a theory here all the time. I don't know whether you have to do that, but you know your facts show one thing, so why try to

(Testimony of Arthur Hanisch.)

argue your theory at this time? Why not just stick to the evidence and present your theory when you get to your brief?

Mr. Mackay: All right, your Honor. Thank you.

The Court: The only reason that I interrupt you is, every time you say something into the record, it is in the record. I am only an umpire. My eye is on the record all the time, so you save your argument for your brief.

Mr. Mackay: Thank you, your Honor.

Q. (By Mr. Mackay): Now, Mr. Hanisch, you in your testimony have spoken about tablets and also liquid. I will ask you what was the nature of the product that you began selling first, I mean, The Stuart Company? A. Liquid.

Q. Liquid? [99] A. Yes.

Q. You sold that all the time from the beginning?

A. We sold that exclusively without any other product until about March, 1942, at which time we brought out a product in tablet form.

Q. In tablet form? A. That is correct.

Q. Subsequent to that time and until the cancellation agreement, did you sell the tablet form along with your liquid? A. Yes.

Q. Was that sold under the same label?

A. Yes—not exactly the same label, because you have to make certain descriptive qualifications that it was in tablet form, but outside of Vitamin C—I don't believe we had C in the tablets at that time. The formula, the vitamin content, was sub-

(Testimony of Arthur Hanisch.)

stantially the same in tablet form as it was in liquid form.

Q. Did you have any dispute with respect to the contents of the bottle containing the tablet form?

A. We had no dispute. However, we became suspicious of the product generally in September of '42, and we had had several reports from druggists of a very short count in the tablet content. After I had a repeated number of those, I had a certified public accountant send one of his men and make a count. I think we have that record of what actually happened [100] on the short count in the tablets.

Q. Is this the report you speak of?

A. Yes, that is October 19, 1942. That is it.

Q. Now, Mr. Hanisch, do you recall when an application was filed by The Vita-Food Corporation to register the trade mark "the Stuart formula," approximately?

A. I don't know the exact date of their initial application. It was shortly after the organization of our corporation, I assume. However, I do recall this, that The Vita-Food Corporation made application under the Act of 1905, and it apparently was turned down because Mr. Lewis came to me—and I think at that time I first met Mr. Wiseman—and they wanted us to change the name in some way, or put a device in it, so that they could qualify under 1905 registration. However, I said that didn't mean anything to me, it wasn't too impor-

(Testimony of Arthur Hanisch.)

tant, and I would rather have a less strong trade mark and not go to the bother of doing anything about it. So they, instead of that, apparently made application under the Act of 1920.

Q. Do you remember when that application was granted, approximately?

A. Approximately—you mean when the trade mark application was granted?

Q. Yes.

A. Approximately September, 1942. [101]

Q. Now, was there any dispute between The Stuart Company and The Vita-Food Corporation in September, October, or November of 1942, with respect to the ownership of the trade mark?

A. You mean had we had a direct dispute with them?

Q. Yes.

A. After we got into the situation of finding that it was impossible for us to work under this contract because of various things which I have told you, we made it a point to find out what our rights were on the trade mark, and I consulted trade mark counsel on the matter. We had, however, discussed the trade mark. I had discussed it with Mr. Lewis in several meetings during the summer of 1942.

Q. Did you consult any patent attorneys with respect to the validity of the application with regard to the trade mark?

A. Yes.

Q. What attorney did you consult?

A. Frederick Miller, of Miller & Hazard.

(Testimony of Arthur Hanisch.)

Q. They are located where?

A. Los Angeles.

Q. What is their standing in the City of Los Angeles?

A. Our counsel recommended it was one of the top trade mark and patent attorneys in Los Angeles.

Q. Did you get an opinion from the [102] counsel?

A. We did.

The Court: Now, what is the purpose of this, Mr. Mackay?

Mr. Mackay: Well, if your Honor please, this has a purpose to show the reasons for believing that that trade mark at that time was not properly registered, all going to show that at the time of the deal the trade mark was of little significance in the minds of our parties as well as the other parties.

The Court: What year would that be?

Mr. Mackay: The opinion is dated November 7, 1942.

Mr. Maiden: November 17, 1942.

The Court: Why is it material whether they had the opinion that the trade mark application was or wasn't good?

Mr. Mackay: Well, if your Honor please, of course this agreement, which I haven't yet and probably should introduce first—I am referring to the agreement of November 28th.

Q. (By Mr. Mackay): I will ask you, Mr. Hanisch, if you had negotiations with The Vita-Food

(Testimony of Arthur Hanisch.)

Company in the fall of 1942 with respect to the cancellation of your agreement of May 5, 1941.

A. I did with their representative, Mr. Wiseman.

Q. Will you state about how long those negotiations were carried on?

A. You mean on this particular contract? [103]

Q. Yes.

A. My attorney got in touch with Mr. Wiseman approximately at approximately 6:00 o'clock in the evening. He telephoned me and told me that they were conferring. He asked me to stand by. I went to his office——

Q. Pardon me. I would like to withdraw that. I don't think you answered the question. I will withdraw the question.

I will ask you if this is the original agreement of settlement of litigation, cancellation of contract, dated November 28, 1942, between The Vita-Food Corporation and The Stuart Company and Arthur Hanisch as third party? A. It is.

Mr. Mackay: Your Honor, I should like to offer a copy of this agreement in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: It is received as Exhibit 12.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 12.)

Q. (By Mr. Mackay): Now, I will ask you, Mr. Hanisch, if prior to the execution of that agreement there was a dispute between The Stuart Com-

(Testimony of Arthur Hanisch.)

pany and The Vita-Food Corporation with respect to the ownership of the trade mark, the validity of it? A. No.

Q. I will ask you if The Stuart Company claimed ownership [104] of the trade mark at that time.

A. We did, but we never brought it to the dispute point.

Q. What were your grounds for claiming ownership of it?

A. Our grounds for claiming ownership were based upon the opinion of our attorney.

Q. Hazard & Miller?

A. Hazard & Miller.

Mr. Mackay: Now, if your Honor please, I should like to offer this opinion in evidence for this purpose: The application, as I shall later show, was filed by The Vita-Food Corporation, and in that application, in order for it to get the registration, it represented to the Federal Government that The Vita-Food Corporation for more than a year past, at least one year, had sold exclusively products under "the Stuart formula" in interstate commerce.

The Court: What do you mean, under the name, "the Stuart formula"?

Mr. Mackay: Yes, your Honor.

The Court: You see, this morning that was very confusing. If you say it owned the Stuart formula, that means it owns the formula. If you say it claims to have owned a name, quote, "the Stuart

(Testimony of Arthur Hanisch.)

formula," unquote, that is an entirely different matter.

Mr. Mackay: Yes, your Honor. [105]

The Court: Because I suppose that you could sell licorice, baking powder, cough syrup, tooth powder, or anything you wanted to under the name, quote, "the Stuart formula", unquote, but you could only sell the Stuart formula if you owned the Stuart formula. Now, you are talking about contentions that The Stuart Company owned the name, is that it, Mr. Mackay?

Mr. Mackay: Owned the trade mark, just the trade name.

The Court: Would you use that expression, "the trade name," so that when we read the record you don't mean by "the trade name," quote, "the Stuart formula," unquote, the product?

Mr. Maiden: Your Honor, it is a trade mark.

Mr. Mackay: It is a trade name.

The Court: I don't know whether it is a trade mark or what it is.

Mr. Maiden: If the Court please, the name "the Stuart formula" was a trade mark.

The Court: What are you arguing about? Mr. Mackay answered my question and we are ready to go on.

Mr. Mackay, I was saying something. I think you are arguing your case at this point, and I don't think it is the right time for you to do that. Will you now resume your statement, Mr. Mackay? [106]

Q. (By Mr. Mackay): I think you have iden-

(Testimony of Arthur Hanisch.)

tified this instrument as being the opinion of your trade mark counsel? A. It is.

Mr. Mackay: I should like, if your Honor please, to offer this in evidence for the purpose of showing, at least in the minds of The Stuart Company officials, that the trade mark which had been obtained by The Vita-Food Corporation was invalid, and that therefore, as we shall later show, little importance was attached in the final settlement to this particular trade name.

Mr. Maiden: If your Honor please, I object to it upon the ground it is incompetent, irrelevant, and immaterial. I don't propose to be bound in this case by the opinion of any attorney as to whether or not this company had the valid ownership of the trade mark, "the Stuart formula." This Court is not called upon in this case to determine that particular point. The Court has no jurisdiction. The Court is only concerned here with determining whether or not The Stuart Company acquired title to this trade mark, "the Stuart formula," from The Vita-Food Corporation.

Mr. Mackay: If I may make this observation—I am sorry.

Mr. Maiden: Now, if the Court please, many attorneys can have different opinions on legal questions, as your Honor [107] well knows. I don't believe that proposed exhibit has any place on earth in this lawsuit.

Now, Mr. Hanisch has already explained that he had an opinion from an attorney telling him, or to

(Testimony of Arthur Hanisch.)

the effect, that the trade mark was not properly registered in the name of The Vita-Food Corporation. There is no need on earth for the opinion itself to be in evidence. I think it is absolutely incompetent. It deprives me of the right to cross-examine the authors of that opinion, and it allows evidence in the case without giving me an opportunity to be presented face to face with the testifying witness and subject him to cross-examination.

I submit it is incompetent, and I also submit that it is beyond the scope of the issue in this case; a wholly irrelevant matter.

Mr. Mackay: If your Honor please, I would like to make this observation: I am not asking this Court to be bound by this opinion. We are not here to determine whether that application was valid or invalid. I put it in for only one purpose, as I stated. Our big problem here, if your Honor please, is to show, as this Court has so many times held in cases of this kind, the intent of the parties, because we have a contract—this last exhibit—under which \$197,700.00 was paid. The Commission has taken the view that that is all for the acquisition of an asset. We take the opposite position. [108]

Now, this Court has held in numerous instances that you can show the intent, the factors preceding the agreement, to try to determine this very difficult question as to what portion of the payment did represent the acquisition of a capital asset, and that is the only reason why I put this in now.

Mr. Maiden: If the Court please, I understood

(Testimony of Arthur Hanisch.)

Mr. Mackay's case from the very beginning to be this: that the payments of these sums of money to The Vita-Food Corporation were in consideration of the cancellation of a contract of May 5, 1941.

Now, do I understand Mr. Mackay's contention to be that the consideration for the payment of these moneys to The Vita-Food Corporation was to perfect or quiet title to this trade name in The Stuart Company?

Mr. Mackay: Oh, no, quite the contrary.

Mr. Maiden: I don't see what this has to do with the picture at all.

Mr. Mackay: We are merely showing, if your Honor please—if I may be permitted to go to that last contract—it merely states there that the Vita-Food has quit claiming any interest it may have in the trade-mark. Now, since it does that, and since the Government has some indication there, and based its whole case upon it, that we were buying its trade-mark, we have got to determine what the intent of the [109] parties was, merely for the purpose of showing what those expenditures remaining were. The purpose of this is this: to prove that these parties who entered into this contract never regarded that trade-mark of sufficient importance to justify a large expenditure of money or the sum specified in that contract. It is trying to prove to your Honor, and it is my contention, that the monies paid here were in cancellation of the contract, and that this was just put in there, and got a quit-claim of it like any lawyer would put in a little sur-

(Testimony of Arthur Hanisch.)

plus, to make sure, and that is the only reason I am offering it, for that limited purpose.

Mr. Maiden: Your Honor, that doesn't serve any purpose in the case as I can see.

Now, Mr. Mackay is taking the position before this Court that this company paid \$197,700.00 simply for the purpose of canceling the so-called onerous contract of May 5, 1941. Now he wants to inject into this case—which is perfectly agreeable with me, if he will stipulate to it—that the obtaining of a quiet title by The Stuart Company of this trademark was the consideration for the payment of this money. Now, the cases are very clear that expenditures incurred in connection with defending or perfecting title to property constitute a cost of the property and are not deductible expenses.

I just don't see where this has anything on earth to do with the case, so far as I understand Mr. Mackay's position [110] to be.

Mr. Mackay: Well, counsel, we have got to interpret that contract, if your Honor please, we have got to determine what was in the minds of the parties at that time, and what they were dealing with, and I don't see how else I can do it. For that purpose I think it is competent and material.

Mr. Maiden: I object to it on the grounds it is incompetent; it deprives me of my right to meet face to face and cross-examine the authors of this document.

Mr. Mackay: It merely shows what our parties had in mind when they were making this contract.

(Testimony of Arthur Hanisch.)

Mr. Maiden: I think Mr. Mackay has the idea of getting some sort of opinion in this case by some lawyer, with a lot of cases cited, and for some influence he thinks it might have in this case.

Mr. Mackay: I am merely following the rule of the Court here, as they have done in so many other instances in this kind of a contract, in trying to determine the intention of the parties when they made the contract, because the Commissioner has held many times that on a question of income subject to taxation the real intention of the parties and the nature of the transaction may be shown by evidence outside the contract. Now, I put it in for that limited purpose. It seems to me it is quite competent. That was affirmed in the Circuit Court of Appeals in the case of Commissioner of [111] Internal Revenue vs. The Proctor Shop, Inc., 82 Fed. (2d) 792.

Mr. Maiden: If Mr. Mackay wants to get this opinion into evidence, let him present the lawyer who prepared it. Let him testify and submit himself to cross-examination. I say it is incompetent otherwise. This witness, of course, didn't prepare it. He wasn't qualified to prepare it. I can't cross-examine on it at all, and, as I said before, I don't think it has anything on earth to do with the case, except that it does bear out Respondent's position that this settlement which is designated "Cancellation of contract" was in reality a document acquiring the property right of this trade-mark, which is a capital asset.

(Testimony of Arthur Hanisch.)

Mr. Mackay: Well, if we were here—if the Court had jurisdiction to determine whether that contract was valid or invalid, I think counsel's objection would be well taken. That is not the purpose. All we are here trying to do is get the evidence in there to show what these people did. We say that this evidence is to show what was in the minds of the parties.

Mr. Maiden: Well, your Honor, Mr. Hanisch has already stated that he had this opinion from an attorney. Now, it would seem to me that that would carry Mr. Mackay's point without putting the opinion in, itself.

The Court: Well, Mr. Clerk, mark this document Exhibit No. 13 for identification. [112]

(The document above-referred to was marked
Petitioner's Exhibit No. 13 for identification.)

The Court: The point is a difficult one, of course, whether or not the second and third parties to the agreement of settlement, which is Exhibit 12, that is, whether The Stuart Company and Mr. Hanisch attributed any value to the trade-mark. It could be just a matter of opinion. Whether they paid anything to get rid of the nuisance value that The Vita-Food Company could make out of being troublesome, and make out of the fact that they had gotten a patent, is another matter.

Mr. Mackay: I appreciate that, your Honor.

The Court: The opinion that Mr. Hanisch might offer in this case would be to a large degree self-

(Testimony of Arthur Hanisch.)

serving, because he is an officer of the corporation. We are in this difficult position of trying to decide whether we are really dealing with the intent of the parties to a contract or whether we are dealing with something else. I would say that the real objection to the offer of the proposed Exhibit 13 is that an adequate foundation has not been laid for it.

Mr. Mackay: It can be marked Exhibit 13 for identification?

The Court: It has been marked for identification.

Mr. Mackay: I think I can clear that up with a later witness and lay the foundation. [113]

The Court: You can lay your foundation. You have no doubt felt a little pressed for time, and I would say that some foundation could have been laid for Exhibit 12, if you would make a note of that. That is your agreement of settlement.

Mr. Mackay: Oh, yes.

The Court: There isn't any doubt about the fact that the agreement of settlement was entered into, but there isn't any testimony about the events actually leading up to the execution of the agreement.

Mr. Mackay: Yes, your Honor.

The Court: There isn't any evidence relating to how the parties arrived at the amount of the consideration which is stated in the agreement. Don't you see?

Mr. Mackay: I understand.

The Court: Well, now, if you don't lay a foun-

(Testimony of Arthur Hanisch.)

dation for the settlement agreement, and then you go on to an opinion—to an attorney's opinion—which has some bearing on one item covered by the agreement, you are vulnerable to all kinds of objections.

Mr. Mackay: Your Honor, I shall lay that foundation.

The Court: How many witnesses are you going to have, Mr. Mackay?

Mr. Mackay: Your Honor, I have at least three more witnesses besides Mr. Hanisch. It is going to take more than [114] just this afternoon.

The Court: Well, it is not going to, because we have no other time.

Mr. Mackay: I see. Well, I will try to work as fast as I can on it.

Q. (By Mr. Mackay): Mr. Hanisch, I will ask you if you participated with anybody of The Vita-Food Corporation in negotiations leading up to the contract of November 28, 1942. A. I did.

Q. With whom did you participate?

A. Mr. Oscar Wiseman.

Q. Mr. Oscar Wiseman, who was he?

A. He was the legal representative or counsel, and vice-president of The Vita-Food Corporation at that time.

Q. Who was president?

A. I imagine it was Paul Overton, but I don't know.

Q. Was anybody else present on your side?

(Testimony of Arthur Hanisch.)

A. No—my side? My attorney, Mr. Robert Dunlap.

Q. He was also secretary of the company?

A. Yes.

Q. Now, can you relate to the Court the substance of the conversations you had at that time with him? A. With Mr. Wiseman?

Q. Yes. [115]

A. We explained that it was impossible for us to operate under this contract. I explained the onerous provisions, the faulty merchandise, the fact that I could buy more advantageously in the open market, the fact that I felt there wasn't the financial responsibility in the company to stand behind bad merchandise, and I just could not continue to operate under that contract.

Q. What did they say? I mean, give the substance of the conversation.

A. We asked about—they asked about what we were willing to pay, and I said that I would like to make some type of installment payment based on the amount of merchandise we would sell, predicated upon a unitage basis.

Q. Upon a unitage basis?

A. That is correct.

Mr. Maiden: I just don't understand. Payment for what?

The Witness: Of this settlement agreement, the release from our contract.

The Court: Why didn't you sue them?

The Witness: Because, your Honor, of this: We

(Testimony of Arthur Hanisch.)

had that thing all set to go, and this was definitely in my mind, that where you are dealing with doctors, people in the medical profession, a suit of this kind—there were bad features about it, the faultiness of this product. We would have [116] dragged this thing through the mud and around the whole proposition.

The Court: Whose proposition?

The Witness: Our proposition, the whole deal, The Stuart Company, because a suit of that kind on a product that is being sold through doctors—it is a very sensitive type of product, and anything that is unsavory about a product that doctors are prescribing for a person's health is going to jeopardize and injure that business.

The Court: We will have a short recess for five minutes.

(Short recess taken.)

The Court: You may proceed, Mr. Mackay.

Q. (By Mr. Mackay): Mr. Hanisch, I think you were asked by the Court why you didn't litigate this matter, the disputes between you and The Vita-Food Corporation—The Stuart Company and The Vita-Food Corporation? A. Yes.

Q. What were your reasons?

A. My reasons were primarily that it was in revealing a lot of facts about bad products, about instability—we would not have tarnished anything but the name of The Stuart Company. As a matter of fact, we were prepared to go to suit in spite of that, as I will bring out later on. [117]

(Testimony of Arthur Hanisch.)

Q. Well, what in your opinion was the importance at that time of the trade-mark "the Stuart formula"?

A. None. As a matter of fact, it probably was in bad repute. The important thing in selling to the medical profession is to establish the reliability of the company. A name means nothing until the doctors have faith in the company that is selling it, and we are detail men. We are selling the reliability of The Stuart Company, and the reason they had faith in The Stuart Company—they liked our approach of selling a high-potency product at a lower price, and I think that is what established the faith of the medical profession in The Stuart Company. There certainly was no magic in the name "the Stuart formula" that made those doctors buy it. May I amplify? When I say the selling of value, I mean our basis of selling.

Q. Yes, go ahead.

A. It is a peculiar billing in the vitamin business that exists in very few businesses, in that you can completely evaluate the product. In other words, you say there is so much unitage of so many vitamins, and you can reduce that to an absolute dollar value. Now, all our sales approach was to the doctors, first to establish the reliability of The Stuart Company, secondly to show that we had a greater vitamin potency to offer compared to other products for less money.

Q. Now, Mr. Hanisch, did you have a chart that you used [118] in your selling program?

(Testimony of Arthur Hanisch.)

A. Yes.

Q. Is that the chart (indicating) ?

A. That is it.

Q. Was this in effect during that time ?

A. Yes.

Q. Can you explain that to the Court ?

A. This chart was prepared with the help of Dr. Borsook before we started operating our company, the idea being to show the doctors what vitamin value The Stuart Company had as compared to other products on the market, and we did not actually use the names of the competitors, but we identified them as "Manufacturer A," "B," "C," "D," and so forth. We did, however, state the exact unitage of all these competing products. We stated our unitage, and then we showed and worked out a factor using the Stuart as 100 per cent, and showed in dollar value what the consumer got of all the competing items, and that was our entire sales approach. As a matter of fact, the name "the Stuart formula" can hardly be seen on this whole sheet.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: It is received as Exhibit 14.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 14.) [119]

Mr. Mackay: If your Honor please, we may

(Testimony of Arthur Hanisch.)

have to withdraw that and get a photostatic copy made. I assume it would be all right.

Q. (By Mr. Mackay): I think you have already stated that you put \$1,000.00 in The Stuart Company originally for stock?

A. And agreed to loan the company its necessary operating capital.

Q. Did you loan the company money to operate on? A. I did.

Q. How much did you loan from the beginning until the cancellation contract?

A. At the time of the cancellation the company owed me approximately \$70,000.00.

Q. Had you taken a salary during this time?

A. I had not.

The Court: Which company owed him \$70,000.00?

Mr. Mackay: The Stuart Company, for moneys advanced.

Q. (By Mr. Mackay): Now, did The Vita-Food Company at any time ever disclose to you any secret process for the production of what is known as "The Stuart Formula"?

A. No, we were absolutely not allowed to ask where their plant was. I have never seen it, and no member of our organization ever knew where it was. There was no secret formula, [120] and in the settlement agreement there was no transfer of any formula of any kind.

Mr. Maiden: What agreement are you talking about, Mr. Hanisch?

(Testimony of Arthur Hanisch.)

The Witness: I beg your pardon?

Mr. Maiden: What agreement are you talking about?

The Witness: In the cancellation agreement.

Mr. Maiden: You say "The Stuart Formula" was mentioned in the cancellation agreement?

The Witness: "The Stuart Formula" as a trade name was mentioned. There was no mention of a secret formula for making a vitamin product, and there was no transfer of such a thing.

Q. (By Mr. Mackay): Well, did you know whether there was ever such a secret process?

A. There might have been in the minds of the people, but the fact remains that we had three other people who said they could make it, and two have made it for us. As a matter of fact, an improved product. [121]

Q. Now, referring to the settlement contract, Exhibit 12, and particularly to Paragraph 8 on page 4 of that agreement——

A. What paragraph? 10?

Q. Paragraph 8.

A. There is no Paragraph 8 on this page.

Q. I guess my bifocals aren't working.

A. Oh, yes, that is correct.

Q. My bifocals are working. Now, that Paragraph 8 in substance states that you are the owner of at least 51 or more per cent of the then outstanding stock of The Stuart Company?

A. Yes.

(Testimony of Arthur Hanisch.)

Q. It also states that you will retain and maintain the ownership of 51 per cent or more of the outstanding capital of the stock until the first party is fully paid and also that you would remain as its managing agent. Now, I will ask you at whose insistence was that paragraph put in the contract?

A. That was at the insistence of Mr. Wiseman of The Vita-Food Corporation.

Q. Do you know why that was insisted upon?

A. Mr. Dunlap and I felt, and they were told—they told us that they had confidence in the management as it existed, because they state that in the contract. I objected most of the evening to discussions on this cancellation [122] agreement centered around this point for one reason, that I was very loath to tie myself up to that management agreement for the length of time involved because of my record of T.B. history, and after we did make objection, they brought in the clause in case of my death or in case of incapacity, that that part of it would be waived. However, it was a very important issue to me, and indicated very strongly to Mr. Dunlap and to me that the important part of what they wanted was not that they felt that the trademark “the Stuart formula” had any magic that would make this business go, but they felt it was completely in the way of management, and I think it is indicated by that length of the contract.

Mr. Maiden: If the Court please, I object to that as being a conclusion of this witness, and ask that it be stricken from the record.

(Testimony of Arthur Hanisch.)

The Court: The objection is sustained and the answer is stricken.

Just read that question again, and Mr. Hanisch, you limit your answer to the question.

(The question was read.)

The Court: There is nothing in Paragraph 8 about remaining as the manager of The Stuart Company, Mr. Mackay.

Mr. Mackay: Yes, your Honor, I am sorry.

The Court: What other paragraph is that in?

Mr. Mackay: I would like to withdraw both questions [123] because it is in Paragraph 5. I am sorry, your Honor, but in my haste here I should have referred to Paragraph 5.

The Court: Instead of 8?

Mr. Mackay: Yes.

The Court: Then, will you reframe your question?

Mr. Mackay: Yes.

Q. (By Mr. Mackay): Now, Mr. Hanisch, I call your attention to Paragraph 5 of the agreement of November 28th, 1942, wherein you as third party represent and warrant that you are the owner and will retain and maintain the ownership of 51 per cent or more of the outstanding capital stock of said company unless the first party is fully paid in accordance with this agreement, and that you further represent and warrant that you are the managing agent in full charge of business affairs of second party.

Then the agreement provides further, should the

(Testimony of Arthur Hanisch.)

third party—that is you—at any time fail to maintain his stock ownership and control or fail up to and including October 15, 1946, to continue as said managing agent of said second party, then and in either such events, third party will forthwith pay to first party the then outstanding balance unpaid to first party, and so forth.

Now, I will ask at whose insistence was that paragraph inserted in the contract? [124]

A. At the insistence of Mr. Wiseman.

Q. Was there considerable discussion about that paragraph? A. A great deal.

Q. It was between you and Mr. Wiseman?

A. That is correct, and Mr. Dunlap, also.

Q. What was the substance of the contract?

A. The substance was that I very much objected to tying myself up to that length of management term, particularly because of the fact that I had had a record of five years of tuberculosis, and I felt that it might be too much of a strain at some place along the line, and I might want to get out. They finally—he finally agreed on the provision, which in case of my incapacity, mentally or physically, or in case of my death, that particular clause would be waived.

Q. Now, I call your attention to Paragraph 7. That is shown as an insert in there——

Mr. Mackay: Your Honor, I want to apologize to the Court. We put in a true copy of this agreement, and in copying, the stenographer has not put in the insert that was there.

I would like to call your attention to the original

(Testimony of Arthur Hanisch.)

there in Paragraph 7 where it says and shows an insert:

“In the event of the abandonment of said trade-mark ‘The Stuart formula’ by Second Party——”

and it is initialled by each one of the parties to the contract, Mr. Wiseman and Mr. Hanisch. I should like to have the privilege of rewriting that particular paragraph and show the insert as it is.

The Court: You may do that, Mr. Mackay.

Mr. Mackay: It will be an exact duplicate.

Q. (By Mr. Mackay): Now, I will ask you, Mr. Hanisch, at whose insistence was that insertion placed in the contract?

A. At the insistence of Mr. Wiseman.

Q. Now, Mr. Hanisch, you have stated that the product that you were marketing prior to the cancellation was an inferior product because it would explode and you got bad reactions from the doctors and druggists and consuming public. Now, I will ask you if after the cancellation of this contract that product was changed? A. Yes.

Q. In what respect?

A. The Vitamin content remained the same, but the base of the product, that is, the vehicle in which the vitamins was contained was changed from molasses to primarily a malt base with no molasses.

Q. Did that eliminate the difficulty that you heretofore had? [126]

A. It eliminated the three difficulties, the explo-

(Testimony of Arthur Hanisch.)

sion, the frothing and the fact that it created digestive disturbance, and the fact that people could not tolerate the taste. The fact is that molasses is a very sweet sickening thing, and the people will take it to start, but after they have taken it for two or three weeks the taste becomes sickening, and we were losing customers, and we eliminated that.

Q. Since the cancellation of that agreement, have you been able to buy vitamins with the vitamin content in that product cheaper than you had bought from Vita-Food?

A. Very much cheaper.

The Court: What do you mean? You asked the question after the cancellation agreement—was the product changed?

Mr. Mackay: Yes, your Honor.

The Court: I don't think you mean that question just in the way you say it. Now, The Stuart Company wasn't manufacturers, so it didn't have any product to change, did it? We don't know whether Vita-Food continued to sell vitamins and changed its formula and sold the formula to someone else. Now, do you mean to ask him a question—well, you see what I mean.

Mr. Mackay: I get your point. Thank you, your Honor. [[127]

Q. (By Mr. Mackay): I will ask you, Mr. Hanisch, if after the date November 29, 1942, the date of the cancellation of this contract, whether the Stuart Company purchased any more products from the Vita-Food Corporation.

(Testimony of Arthur Hanisch.)

A. At the time of the settlement we took in some orders that were on the books at that time, but we did not purchase, as I recall it, any additional orders after that time.

Q. Well, after that, then, where did you get your supply from?

A. William T. Thompson Company.

Q. Were they connected in any way with the Vita-Food Corporation?

A. They were not.

Q. Did you get the products there at a substantially lower price than you had been paying for them?

A. At a very substantial saving.

Q. How much, can you tell the Court?

A. Our first order—I would like to ask Mr. Dunlap if I could get a sheet that I have that written on. These are figures. Is it in order just to read this note?

The first tablets Thompson billed to us on December 14, 1942, were without Vitamin C, but on December 4, 1942, Thompson's quotation was 53.9 cents per bottle of 96 for the same tablet with C as we were getting from the [129] Vita-Food at 87 cents; 53.9 as against 87 cents.

I have a projection of that indicating that the saving at the Thompson price for the length of time we had done business with Vita-Food, which was a little over a year and a half, would have been \$99,617.00 on that basis.

Q. Now, Mr. Hanisch, did you ever receive a formula from the Vita-Food Corporation?

(Testimony of Arthur Hanisch.)

A. Never received a formula.

Q. Was a formula ever disclosed to you?

A. No.

Q. Now, after the settlement agreement, did you change your labels? A. We did.

Q. In what respect? I call your attention to Exhibit 9. Will you please call the Court's attention to the changes you made?

A. The important change and the significant change we made in the label was in the preamble statement under the name "the Stuart formula," and the statement as it was originally when we were purchasing from Vita-Food was "An aqueous concentrate derived from natural food sources, fortified."

The change after we went to the new product was "the Stuart formula, a balanced high-potency multivitamin concentrate." [129]

Now, the reason for that change was this—and it has significance: The above are samples of labels used on the original formula last purchased from The Vita-Food Corporation during the month of February, 1943, and being on the new formula as made subsequently by the William T. Thompson Company and others. It should be noted that the copy under the name of "the Stuart formula" on Sample A, reading: "An aqueous concentrate derived from natural food sources, fortified" was changed to read, "A balanced high-potency multivitamin concentrate," because it was believed by experts to be misleading and subject to Food and Drug violations. [130]

(Testimony of Arthur Hanisch.)

The reason for that—I might amplify what that was—that the implication as a result of the information we have obtained from Vita-Food was that we were selling primarily a natural product, which was not the case. It was merely a synthetic product.

Q. Mr. Hanisch, the contract of cancellation, I think, stated that whatever stock Mr. Lewis had would be transferred to you?

A. That is correct.

Q. Stock of The Stuart Company?

A. That is correct.

Q. Now, how much was transferred, do you remember, at that time?

A. As I recall it, it was whatever Mr. Lewis' interest was, which, as I remember, was 15 per cent.

Q. Yes. Now, what in your opinion was the value of the stock at that time?

Mr. Maiden: Your Honor, I object to that. There has been no basis in the record here for this witness to express his opinion as to the value of the stock at that time. The witness is not shown to be qualified to express an opinion as to the value of the stock.

Mr. Mackay: Well, if your Honor please, I think that the returns of the company, the evidence already in showing continued losses, showing the liability to him of [131] \$70,000.00, showing poor products is about sufficient to show that the stock had no value, but there is one rule of law that is very definitely set, that a president of a company or an owner of stock can testify as to what, in his

(Testimony of Arthur Hanisch.)

opinion, is a fair market value. I insist that it is a proper question.

Mr. Maiden: It is nothing on earth but a self-serving declaration of this witness.

The Court: Overruled.

The Witness: It had no value whatever.

Q. (By Mr. Mackay): Well, what in your opinion was the fair market value of the trade name at that time?

A. The trade-mark "the Stuart formula"?

Q. Yes.

A. It had no tangible value to us whatever, insofar as—well, it had no realistic value. Let me explain it this way: As a matter of fact, we had considered using the name "The Stuart Company" and calling it "Stuart Vitamins" because of the bad repute of the product we had. However, I estimated what it would cost us to change the name of the product to a name like "Stuart Vitamins", and it would have cost us—and I have a figure, may I refer to that figure—I estimated that at the time we were considering making that change to a new name, and all of our men agreed that this would have been the cost, we would have had to make a notification to all the doctors [132] who were on our mailing list at that particular time, and also to our drug outlets. The number of doctors we had at that time was 17,428. The number of drug outlets we had was 6,746. Our estimate of what that cost would have been was predicated on this: Our men had to call on the doctors anyway. They would have

(Testimony of Arthur Hanisch.)

informed them verbally, so there was no added expense on that particular point. However, we felt that the mailing of advice to each one of our doctors—to each one of our drug stores would have been ample notification to make them aware that there had been a change. Those mailings through our experience have cost us six cents apiece, so that the total cost of that mailing would have been \$4,713.00.

We also, at that time, had 11,700 bottles of merchandise on hand which would have had to be relabeled. There Lewis or the Vita-Food Corporation at that time was charging us 10 cents to do relabeling. For that reason we used the figure of a cost of 10 cents which would have involved changing this label to a new name, which comes out \$1,170.00.

In addition to that there would have been the work and experience—art work of getting up our new labels with a new name, which we estimated at \$1,000.00.

That is a total figure of \$6,883.93, which I think is a very fair estimate.

But assume that you double or triple it. I would say that is an absolute outside figure of what a change to another name [133] would have involved.

Q. Well, have you some idea about what the total sales of the vitamin industry were about that time?

A. It was in a terrifically growing period at that time. I am not qualified to give you the exact figure.

(Testimony of Arthur Hanisch.)

Q. Would you have any idea as to what the percentage of the sales of your product was to the total?

A. Infinitesimally small, but I have no figure.

Mr. Mackay: You may take the witness.

Cross-Examination

By Mr. Maiden:

Q. Mr. Hanisch, when did you first meet Mr. Lewis and under what circumstances?

A. As I recall it—I am not clear whether it was December of '41 or——

Q. You mean December of 1940?

A. December of '40 or January of '41. It was one of those two months. The circumstances were this: That Mr. Charles King, who was a reporter for the Pasadena Post, and who knew Dr. Borsook had arranged the meeting with them. We met with Mr. Pringle, one of my associates at the Annandale Country Club for lunch.

Q. I believe you already explained on direct examination that you were interested in entering some business field out here in California at that [134] time?

A. That is correct.

Q. Mr. Hanisch, what was your past business experience?

A. I had gone to England. I spent three years there organizing the subsidiary of a hosiery manufacturing company. In 1921 I formed, with my brother, the Vogue Hosiery Company, and im-

(Testimony of Arthur Hanisch.)

ported machinery for the manufacture of infant hosiery, and I was in that business and in the merchandising and I also was a member of a corporation in New York which merchandised that hosiery. I was very active, almost exclusively, in that field of merchandising and manufacturing until 1932, when I came to California, having contracted T.B.

Q. But you had had a long and active business career in an executive capacity in respect to manufacturing and selling corporation prior to 1941?

A. Not selling corporation, selling products made by a corporation.

Q. Now, Mr. Hanisch, at that time I believe you stated that the vitamin field was entirely new to you?

A. Completely new.

Q. You were referred to the Vita-Food Corporation as being a corporation that at that time was manufacturing and selling a vitamin concentrate, is that correct?

A. That is correct.

Q. And with the view of becoming a seller to the retail trade of that vitamin concentrate? [135]

A. That is not completely correct, not to the retail trade. Through wholesalers to the retail trade.

Q. Through wholesalers to the retail trade. You then discussed with Mr. Lewis of the Vita-Food Corporation the proposition of your entering into a contractual relation with Vita-Food Corporation which would enable you to become a distributor of the concentrate that was being manufactured by the Vita-Food?

A. That is correct.

Q. Now, on February 3, 1941, is it true that

(Testimony of Arthur Hanisch.)

you purchased 3,000 gallons of this vitamin concentrate from the Vita-Food Corporation?

A. I am not sure of the exact date in February, but it was in February, 1941.

Q. On March 7, 1941, did you make a further purchase? A. That is correct.

Q. Of 3,000 gallons of this concentrate?

A. That is correct.

Q. Now, was it the understanding at the time you made this two purchases of vitamin concentrate that you would cause two separate corporations to be organized, that you would transfer this gallonage of concentrate to these corporations?

A. That is correct.

Q. And that those two corporations then would sell the product? [136] A. That is right.

Q. Now, the Shaler Food Products Company and The Stuart Company were organized in March of 1941 at the same time, I believe you stated?

A. That is correct.

Q. I will ask you if the date of organization wasn't March 27, 1941?

A. I could not give you the exact date. I know approximately when it was.

Mr. Mackay: If you say, we will so stipulate.

Mr. Maiden: That is true.

It may be stipulated, if the Court please, that the Shaler Food Products Company and The Stuart Company were organized on March 27, 1941?

Mr. Mackay: Right.

Q. (By Mr. Maiden): Now, Mr. Hanisch, did

(Testimony of Arthur Hanisch.)

you and Mr. Lewis discuss the name that would be used by these corporations for the concentrates that were to be sold by you?

A. We did. The major part of my discussion on that, however, was with Mr. Pringle, who was one of the executives of Lord & Thomas, the advertising agency.

Q. Just what was your understanding about the name that was to be used to sell these products under?

A. Understanding in what respect? [137]

Q. As to what names would be used and who the names would belong to.

A. We, in our discussion felt that simplification—the name of the company was the primary thing in my mind, and rather than get some trick name such as Multiceben or Hexylresorcinol we would get a more personal name. I had not been familiar with merchandising under trade-mark brands. We never had had one in my hosiery business, so I placed very little emphasis on the business of trade-marks. To me it was a matter of merchandising and management.

Q. You say you had been in business for some 15 or 20 years prior to 1932? A. Since 1921.

Q. You had not become aware in all that time that a trade-mark was a valuable asset?

A. Oh, no, I did not say that. I said my own company had never subscribed to the theory of merchandising trade-marked merchandise.

(Testimony of Arthur Hanisch.)

Q. But as a business man did you appreciate the value of a trade-mark?

A. A trade-mark certainly must have value because a trade-mark produces profits. A trade-mark must be one contributing factor to the creation of products, which may be merchandising, management and trade-mark. I think it would be very difficult to isolate it, but it would be foolish to say [138] it would not have some value.

Q. You were interested, of course, in giving the product that you were going to sell a name?

A. It had to be a name in this respect: A name to me in the business of an ethical operation is—the important thing about a name, and Squibbs use this very succinctly as that terminology, “know the namer”.

The name is important to Squibbs and names within the Squibb line of 200 products is just a matter of differentiating in the doctor's mind between those products rather than to make it stand out in the eyes of the consumer.

Q. Now, Mr. Hanisch, did I understand you to state on direct examination that the name “The Stuart Formula” was not in existence at the time of the execution of the May 5, 1941, contract?

A. I believe the name had been—we had decided to use that name before the execution of the contract. I am not too definite on that. It was very close in there.

Q. Who was responsible for choosing the name “The Stuart Formula”?

(Testimony of Arthur Hanisch.)

A. It was a combination on conferences. Mr. Lewis sat in on one or two of them. The primary conferences were with Mr. Pringle of Lord & Thomas and Mr. Liesman of Lord & Thomas. I had felt that we should have a proper name. As I explained this morning, I couldn't very well use my name because of [139] practical difficulties of spelling. We therefore decided on using the expedient of using my children's names, and there Mr. Liesman supplied the added business of "formula" to tack on to "Stuart."

Q. According to your testimony the Vita-Food Corporation had nothing on earth to do with choosing that name, is that right?

A. I wouldn't say that completely, because Mr. Lewis was in on the conferences, and I think Dr. Borsook also was aware of it and approved it.

Q. I want to get one thing straight, if I can. You don't claim that you are responsible, you and your associates, are responsible for the name of "The *Stewart* Formula"?

A. I think we had a great deal to do with it.

Q. Did the Vita-Food Corporation, that is, Mr. Lewis, have a great deal to do with it?

A. I, of course, don't know what went on in the discussions within the Vita-Food Corporation. I do know that Mr. Lewis was in on meetings that we had when we were considering the trade name.

Q. He contributed to the origination of that name, "The *Stuart* Formula"?

A. He sat in on the meetings. Now, whether the

(Testimony of Arthur Hanisch.)

contribution of the name itself was his or not, I am not too sure. However, I am inclined to tell that the name "Stuart" was a [140] thing hit upon by Mr. Pringle and I do know that the "formula" was hit upon by Mr. Horace Liesman of Lord & Thomas.

Q. Now, isn't it a fact that Mr. Lewis himself was responsible for the name "Stuart" being in that trade name?

A. I am not sure, but I don't believe that to be true.

Q. But you don't deny it, you just say that you don't believe it to be true?

A. I am not sure on that point. [141]

Q. Now, Mr. Hanisch, prior to the execution of the contract of May 5, 1941, was it your understanding that the trade name or the name under which the products that you were to sell, were to be sold, would be the exclusive property of The Vita-Food Corporation?

A. It was, for this reason: That, if I felt that I could justify my faith in the men I was doing business with, the other elements of the contract had little or no significance.

Q. In other words, it was your understanding and your agreement, from the beginning, that the trade name under which your articles would be sold, were to be the property of The Vita-Food Corporation and that you laid a claim to that property?

A. That is correct.

Mr. Maiden: Now, in order to fill in some gaps

(Testimony of Arthur Hanisch.)

that might be needed by the court, I think it well that we should put in these contracts of February 3, 1941, and March 7, 1941. I might state, if your Honor please, that these contracts are really in the form of letters, written to Mr. Hanisch, Vita-Food Corporation, providing at the end of each letter a place for the acceptance by Mr. Hanisch of the terms set forth in the letters.

Mr. Mackay: No objections to that. We have copies here. I really would like to put them in myself. I say, I [142] have no objection. I have copies of them.

Mr. Maiden: I would like to have them. You put in the original. Let's see, that is right, March 7.

Mr. Mackay: And February 3rd.

Mr. Maiden: I would like to at this time offer in evidence as Respondent's Exhibits A and B, the contracts of February 3, 1941, as Respondent's Exhibit A and the contract of March 7, 1941, as Respondent's Exhibit B.

The Court: May be received.

The Court: The one of February, is that it, Mr. Maiden——

Mr. Maiden: The one of February 3rd would be A and the one of March would be B.

(The documents above-referred to were received in evidence and marked Petitioner's Exhibits Nos. A and B.)

The Court: Off the record.

(Testimony of Arthur Hanisch.)

(Discussion off the record.)

The Court: On the record.

Q. (By Mr. Maiden): Now, Mr. Hanisch, when you first approached Mr. Lewis with respect to this type of arrangement, was Mr. Lewis immediately interested in entering into such an arrangement with you?

A. It isn't correct to say that I approached Mr. Lewis, [143] because Mr. King had told Mr. Lewis about me and Mr. King asked me whether I was interested. I said that I was, if I could prove certain points about the product, and he arranged a meeting with us. I never went to Mr. Lewis, so the question, as you phrased it, isn't completely a correct statement.

Q. Well, you say you were interested in proving the quality of the product?

A. Oh, no, I was interested in seeing who was behind it and seeing what the nature of the thing was. You see, I knew nothing whatever about it until my first conversation with Mr. Lewis.

Q. Did you make any investigation of The Vita-Food Corporation before you entered into the agreement of May 5, 1941?

A. I attempted to, without very much success.

Q. What sort of an investigation did you undertake, Mr. Hanisch?

A. I gave Mr. King—well, in the first place, I tried to get a financial report, which was not avail-

(Testimony of Arthur Hanisch.)

able because they never submitted a financial statement to Dun & Bradstreet or any others.

Secondly, I listed about seven points that I wanted verified, and I recall one. I wanted to see the plant, to see whether they had sufficient finances and equipment to provide for expanding business. I wanted, primarily, to find out whether they had the finances that were capable of, not only [144] taking care of production, but taking care of bad merchandise that I might have to take back, for which they were responsible; taking bad merchandise back, for which there was a food and drug responsibility. I was very interested, and another thing, according to the way I had to pay for this merchandise, the matter of financial responsibility was a very important one, because I made a prepayment of 50 per cent when I placed the order, before I got the merchandise.

I had no way of earmarking the raw materials as mine, and the contract states, as far as they——

Q. Just a moment. You are getting far off the question. A. I am sorry.

Q. I want to move along——

A. What I am trying to tell you, that is the type——

Q. I want to know what investigation you made and what did you find out, with respect to the financial responsibility of Vita-Food Corporation, prior to entering into the contract.

A. I listed six or seven points which I had asked Mr. King to take to Dr. Borsook and Mr.

(Testimony of Arthur Hanisch.)

Lewis. They assured me that their financial situation was all right. They had the facilities, equipment to manufacture; they had assets and controls which were very important.

Then, I went further, and this is not in reference to Vita-Food, but I did make a considerable check on Dr. Borsook through people I knew at Cal-Tech. That is about the [145] extent of it, though.

Q. I believe you stated that you wanted to see the plant and equipment? A. That is right.

Q. Did I understand you to say, on cross-examination, that you never did see this plant?

A. Never did see the plant.

Q. Why were you willing to sign that contract of May 5?

A. I had a great deal of faith in the academic standing of a man in Dr. Borsook's position, and my whole idea in signing that contract was faith in a man of his academic standing.

Q. Do I understand that you are, in any way, possibly impugning the integrity of Dr. Borsook?

A. I am not at all. I am telling you why I signed the contract. Everything I checked on Dr. Borsook was very good.

Q. Have you found out anything to the contrary? A. Not anything.

Q. Now, in other words, notwithstanding that you had—was it seven points?

A. Approximately. There was a list.

(Testimony of Arthur Hanisch.)

Q. A list of things that you wanted to find out about The Vita-Food Corporation?

A. That is correct.

Q. You simply wound up by taking the word of Dr. Borsook and Mr. Lewis, with respect to each one of these points? [146]

A. Primarily, yes.

Q. And you made no other or further investigation or check?

A. That is true. However, I went to my lawyer and told him what I was doing. He suggested I do not sign this contract. He said it was not realistic. I said, "It makes no difference, because I have faith in what Dr. Borsook has told me, and I have faith in his standing."

Q. Now, are you leaving the impression, Mr. Hanisch, I don't mean to be impertinent, but are you leaving the impression, so to speak, that you were kind of a "babe in the woods" in respect to this contract?

A. I may have seemed that way; however, I have known people in academic circles and I remember when Dr. Borsook—I asked him, "What do you want out of this?" He said, "I want nothing whatever out of this." I said, "That is a very unusual arrangement." He said, "Then, you don't know people in academic circles." I said, "I happen to have gone to college for a few years, and I do know them and have respect for them."

Q. So far as you know, Dr. Borsook never received one dime out of the arrangement?

(Testimony of Arthur Hanisch.)

A. I haven't any idea. I had nothing to do with Vita-Food business.

Q. You never paid him anything? [147]

A. No.

Q. Now, were you represented by a lawyer or anyone else in the drafting of this May 5th contract?

A. The contract was drafted by Vita-Food people, by their attorney, I assume, and there was an original one submitted, in which Mr. Pelletier and Mr. Pringle and I consulted with Mr. Lewis. We made some revisions and changes. We tried to get others, which were not revised, and Mr. Pelletier, who is the president of the Purex Corporation and one of our directors, objected very vehemently to my going into an agreement. I said, "Well, a person who hasn't gone to college don't know people in that field. Please believe me, I am doing this as a matter of good faith."

Q. Are you intending to leave the impression here that Dr. Borsook represented that he had an interest in The Vita-Food Corporation?

A. I am not.

Q. Did he represent to you that he had any control over The Vita-Food Corporation?

A. None whatever. He said that he had faith in their ability to manufacture, and he decided to turn this process over to them for manufacturing, as he decided to turn it over to us for merchandising.

Q. Now, how long would you say that negotia-

(Testimony of Arthur Hanisch.)

tions went on in the drafting of the actual final document of May 5, 1941? [148]

A. Well, it is rather difficult for me to give you a definite answer on that. I imagine they started about the time of our—it would have been about the end of March.

Q. About the end of March? A. Yes.

Q. Were there several drafts of the proposed final agreement written?

A. I wouldn't know what they wrote before it was shown to me. As I recall, there was one draft before we had the revised final.

Q. Did you read every bit of the agreement?

A. I went over it carefully.

Q. Did you approve of the agreement?

T. I beg your pardon?

Q. I say, you approved of the agreement?

A. In this way: I felt that there were onerous things in it, if I were in the hands of unscrupulous people. Again, I went back to my faith in Dr. Borsook. It isn't the type of agreement in an ordinary business transaction, with ordinary business people. That is no reflection on business people, either.

Q. However, I believe this agreement of May 5, 1941, is an agreement between your two corporations and The Vita-Food Corporation, and I don't believe that Dr. Borsook is a party to this agreement. [149]

A. Absolutely not. He knew the nature——

The Court: What did your faith in Dr. Bor-

(Testimony of Arthur Hanisch.)

sook have to do with whether or not Vita-Food Corporation was or was not a reliable concern? That is what we don't understand.

The Witness: Do you want me to answer that?

The Court: Well, yes, go ahead, if you have an answer.

The Witness: My signing this kind of an agreement was predicated on Dr. Borsook's recommendations of The Vita-Food Corporation and the men connected with them. Therefore, I went into the contract.

The Court: What did he know about them?

The Witness: I wondered about that, because they did not perform productwise or otherwise, the way he represented, and then came my disillusionment some time afterward.

Q. (By Mr. Maiden): When did this disillusionment strike you, Mr. Hanisch?

A. About the first time that a bottle of our material blew up, probably a month after we were in business.

Q. You say about a month after you commenced selling this? A. I say that roughly.

Q. Oh, I understand that it is just an approximation. That would be then in the spring or the summer of 1941?

A. June or July, 1941. [150]

Q. Did these bottles keep popping all through 1941?

A. We had explosions right along and then—I don't know how long—there were several stories

(Testimony of Arthur Hanisch.)

told me of a way by which this could be corrected.

The Court: All right, now, the point of this question is: We have in evidence an exhibit, which is Exhibit 5. It shows the amounts you paid Vita-Food Corporation during 1941, 1943, and during the whole year 1944 and during three months in 1945, and you paid \$16,000.00 up to March, 1943; \$52,787.15 up to March, 1944, and \$90,262.96 to March, 1945.

You have testified that one month after you entered into this agreement with Vita-Food, products began to go bad and bottles began to explode, and it was very embarrassing to you to have your customers tell you that you had sold them, as a distributor, a product that had something wrong with it.

Now, do you mean to say that you continued to sell this same product for the rest—for all of the years, 1943, 1944 and 1945, after you knew, within one month after you entered into your contract, that you had a bum product?

The Witness: Oh, I don't intend to say that at all, because we stopped buying from The Vita-Food Corporation in November, 1928, when we had the cancellation agreement.

The Court: Not 1928?

The Witness: I mean 1942, November 28, 1942. We stopped buying from The Vita-Food Corporation. [151]

The Court: I don't think so, not according to Exhibit 5.

(Testimony of Arthur Hanisch.)

The Witness: Well, those payments were made on products that we bought from another manufacturer, on the changed product.

The Court: That is interesting, then, because your exhibit says: "Schedule of Payments to Vita-Food Corporation, under Agreement of November 28, 1942."

Mr. Mackay: That is a settlement agreement.

The Court: Is that your settlement agreement?

Mr. Mackay: Yes.

The Court: Mr. Maiden, what is your question? You asked why they kept on selling the product of The Vita-Food Corporation. Was it your understanding——

Mr. Maiden: If the Court please, I have a very definite understanding that The Stuart Company continued to sell this product.

The Court: For how long?

Mr. Maiden: Up until the agreement of November 28, 1942, and that after that time they sold some of the concentrate, which they had purchased from The Vita-Food Corporation, but which had not been delivered to The Stuart Company at the time of the execution of that contract on November 28, 1942.

The Court: Then why don't you ask the witness to testify about the facts, so that if your own understanding is [152] not correct, you can straighten out your own understanding.

Mr. Maiden: That is exactly what I was undertaking to do, your Honor.

(Testimony of Arthur Hanisch.)

The Court: Please reframe your question. Your question wasn't clear to me, and I don't think it was clear to the witness.

Q. (By Mr. Maiden): I believe you stated that within a month or so, a short period after you commenced operating, that the bottles began exploding?

A. That is correct.

Q. Now, that would be in the spring of 1941?

A. That is correct.

The Court: What month?

The Witness: June or July. I wouldn't know definitely.

Q. (By Mr. Maiden): 1941. Now, then, did you continue to sell that product to the public up until the time you entered this agreement of November 28, 1942?

A. Yes, with changes being made as a result of my complaints to Mr. Lewis about this factor.

Q. Now, what changes were being made?

The Court: What date in 1942?

Mr. Maiden: It would be the date of that agreement, [153] November 28, 1942. I believe that is Petitioner's Exhibit 12.

The Court: Well, that is a period of 12, 15 months, then. I will ask you my question again, Mr. Hanisch: Why did you continue to sell a poor product for a period of 15 months?

The Witness: In the first place, I had a considerable investment in a business. That, of course, doesn't justify selling a bad product. You can't

(Testimony of Arthur Hanisch.)

condemn a product because of one mistake. It might have been one bad batch. I was assured by Mr. Lewis, and also Dr. Borsook, that trouble could be cured and remedied, and they told me very technical things they were doing, which would change the situation, and I believed them. However, the thing that stopped the——

The Court: Well, then, you mean that you continued to have this trouble during this period from June, 1941, up to the fall of 1942?

The Witness: That is correct.

The Court: During that period there wasn't any change made in the base of the product by The Vita-Food Company?

The Witness: I couldn't tell you that. As far as I know, I don't believe there was. The palliative I talked about——

The Court: That has been mentioned before and so you are talking about something that let the bottle run over when it fermented.

The Witness: Venting the cap. [154]

The Court: All right. Does that answer your question?

Mr. Maiden: Yes, your Honor.

Q. (By Mr. Maiden): Mr. Hanisch, I will ask you if it isn't a fact that over this period, from the time of commencing the active selling of this product, up until the cancellation of the contract on November 28, 1942, your sales were not increasing? A. I say they were not.

Q. I asked you if they were not increasing?

(Testimony of Arthur Hanisch.)

A. They were for a reason. That was the fact that we were offering greater vitamin values for the money, but we were also on a terrific upsurge of a wave of vitamin buying.

Q. Mr. Hanisch, I believe you stated that in these consultations with Dr. Borsook, that it was agreed that his primary interest was in putting out for the consumption of the greatest number of people at the least cost, a fine vitamin concentrate.

A. Exactly.

Q. And that he and Mr. Lewis were interested in a man who was willing to do that, rather than a man who simply wanted to go into it from the profit angle, is that correct?

A. No. That is not correct. We decided that we didn't want to take an exorbitant profit; that we would both be willing to take a reasonable profit, and I went further than that [155] and I said, "I would give part of my profits to remain in what they were trying at the California Institute of Technology."

Q. Well, did Dr. Borsook tell you that this vitamin concentrate that was being made by The Vita-Foods was equal or superior in quality to any other vitamin concentrate of the same character not being offered on the market?

A. I was told that it was a product superior to the best selling product that I knew of at that time on the Coast, in that it was a natural product which was the buying merit in Galen B. In addition to the B complex factors that Galen B had

(Testimony of Arthur Hanisch.)

in their product, we also had vitamins A, B and D, which was an added selling angle.

Q. And Dr. Borsook told you that?

A. Yes.

Q. Now, is it a fact that The Stuart Company never did meet their minimum quota under the contract, up until the time of the agreement of November 28, 1942? A. That is true.

Q. Now, Mr. Hanisch, what effort, if any, did you make to promote the sale of this product on a national basis?

A. Having men, hiring of men, who would call on doctors, the getting out of literature to doctors, a very unique procedure which had never been done before, as far as we could find out, in that at the inception of the program, we sent a full size bottle that retailed for \$1.95, by Western [156] Union messenger to the doctors in Southern California. We repeated that operation in San Francisco, repeated it in the Northwest and repeated it in Chicago.

Q. Now, that was at the inception, when you first started? A. That is correct.

Q. Did you continue that promotion?

A. We did at equal or greater intensity.

Q. I am just wondering how much you actually put into this corporation, The Stuart Company, when it started off; working capital. How much working capital did you give the corporation?

A. It would be difficult for me to recall the exact figures. However, I do know that I paid

(Testimony of Arthur Hanisch.)

Mr. Lewis in advance on those first two shipments, which you referred to before, in February and March. The item was \$3,000.00 on each occasion, which would be \$6,000.00. That is 48,000 pints. I would assume that I paid well over 30 or 40 thousand dollars, which the company later paid me, and I took a note for that payment. I can answer it a little bit further. At the time of the cancellation of the agreement, I do know that I had notes payable from the company to the extent of \$70,000.00.

Q. Now, do I understand you to state directly or inferentially, that the product was receiving a bad name?

A. Yes, and the way we were finding that out was: Our [157] men would go in to call on doctors, that is the men we call detail men, and one of the things we had instituted was a matter of those men getting together, and when they did get together they would write in the complaints the doctors gave them, and the complaints we had from them were two, primarily. One, the digestion factor, and the other one, the fact that people could not continue to take a cloying, a sweet cloying product.

In other words, the doctors were satisfied that we had a good thing at a good price, but they would not prescribe it to a patient who could not continue to take it.

Q. Now, was that condition getting progressively worse during 1941?

A. We brought it to Mr. Lewis' attention and he assured us he was working on it to make a

(Testimony of Arthur Hanisch.)

change in the taste factor. He actually submitted to us different tasting things, which we said were just as bad as the original. So, we never did get a product that we felt was satisfactory, although we repeatedly called it to his attention.

Q. Mr. Hanisch, who suggested the idea of this promotion, that is the type of promotion work that you would carry on in advertising this product for sale?

A. Primarily William Pringle, who was at that time an executive of Lord & Thomas and is now executive vice-president in charge of Foote Cone & Belding operations here. They are [158] successors to Lord & Thomas.

Q. You said "primarily." Would that indicate that someone else had something to do with this idea?

A. Someone else had to have something to do with it, because if you will look at the contract carefully, you will find there is a clause in there, that our advertising material had to be approved, and the thought behind that was: They didn't want us to make a statement that wasn't consistent with what they knew this product was.

Q. So, now coming back, I want to know: Is it a fact that Mr. Lewis and The Vita-Food Corporation participated and contributed to the promotion campaign that was put on by you for the public?

A. Not in one respect. The only thing they did—we had to submit it to them and have their O.K., because of that clause in the contract.

(Testimony of Arthur Hanisch.)

Q. Mr. Hanisch, you lived in California prior to 1932, is that right?

A. I have been here on visits before, but not permanently.

Q. Where was your home before you came to California?

A. Waupun, Wisconsin. It is a small town.

Q. In your eastern business, where were you located?

A. I lived in Waupun, originally had my factory there. We subsequently—as it expanded and the labor market there [159] wasn't buying enough, we took over a plant in Fond du Lac, which was 18 miles from there. Subsequently, I worked on a merger and that eventually grew into a plant in Eufaula, Alabama, and Little Town, Pennsylvania, and Reading, Pennsylvania. Then we had a selling organization for those manufacturing plants, which was located in New York City.

Q. What was the nature of this eastern business; that is, what was the product that you manufactured or sold? A. Children's hosiery.

Q. Children's hosiery?

A. That is right. Anklets and bobby socks.

Q. Was that hosiery sold under any particular name? A. No name of ours whatsoever.

Q. Well, was it sold under any name?

A. Some of it was; some of it was not. For instance, if we sold the S. H. Press Company, they might or might not have us put their name on. If we sold Marshall Field, they might or might not

(Testimony of Arthur Hanisch.)

have us put their name on it. We, however, never put our name on the product.

Q. Now, Mr. Hanisch, you say, then, that during 1941 and 1942, up until the time you entered this agreement of November 28, 1942, that the name, The Stuart Formula, had come into some ill repute?

A. Yes, I don't believe it is fair to say that The Stuart Company, as a company, did, because the doctors, I [160] think, liked our presentation of greater value. Whenever we did have a complaint, we did everything possible to keep the good will of that doctor and straighten out whatever harm might have been done in the situation, to the point where we bought merchandise from druggists which had been spoiled by these explosions.

Q. Were you experiencing difficulty in selling this concentrate from the very beginning?

A. Yes, because of the nature of an ethical operation in anything but an easy one.

Q. Well, did it become easier to sell the product, as you progressed from your commencing date?

A. Compared to the amount of money and the promotional effort we were putting into it, it was becoming more difficult, because a business of bad repute in the pharmaceutical field has a tendency to snowball and kick back on you as a snowball.

Q. And that bad repute had been established prior to the beginning of 1942?

A. Yes. You asked why the sales increased in spite of that. I can explain that very readily, be-

(Testimony of Arthur Hanisch.)

cause it came with opening new territories. Original sales were in Los Angeles. They then expanded to San Francisco and then—then we went to Chicago. That will account for the increase in sales.

Q. Now, notwithstanding all this difficulty you were having with the product, which you say had come into ill repute, [161] you still make no effort to cancel this product and break off business relations with The Vita-Food Corporation?

A. No, I was very patient. I brought the matter to their attention, with the hope they could be worked out in an amicable way.

Q. Did you find them to be agreeable men to deal with?

A. I don't know whether I can answer that. I mean, there were feelings in my mind that indicated that probably I had too much faith in people that I had trusted.

Q. Now, I believe you stated that the stock of The Stuart Company at the time of this contract—that this agreement was entered into on November 28, 1942, had no value? A. That is right.

Q. I believe you likewise stated that, in your opinion, this trade-mark, the name, The Stuart Formula, had no value at that time?

A. I qualified that statement, if you recall. We had debated at that time to continue functioning as The Stuart Company, bringing out an entirely different name from The Stuart Formula name. One we considered was "Stuart Vitamins." [162] In asking me whether I figured it had any value, I would have said it had the value that is tanta-

(Testimony of Arthur Hanisch.)

mount or comparable to what it would have cost us to make that change. I read the figures and our outside estimate on that was \$6,600.00, as I recall it.

Q. Now, just how much value did you place on the trade name, "the Stuart formula"?

A. None whatever, outside of what I just told you.

Q. Do you represent to the Court that you were not interested in obtaining the name, "the Stuart formula"?

A. We, in our contract, state for the "business' sake."

Q. I am not asking you about what you state in your contract, I am asking you to state to me now, whether or not you considered that the trade name, "the Stuart formula," had any value.

A. Are you talking prior to the contract, signing of the contract, at the time of signing or after the signing?

Q. I am talking about prior to and at the time, and after you signed the contract.

A. Prior to the signing of the contract, I had my whole plans made to get out an entirely new name. I placed no value on it whatever. However, I also came against a stone wall. I understood from this contract that I must buy my merchandise from Vita-Food, and I, therefore, could not go ahead with my plan to come out with any new name. [163]

Q. I am not talking about that. I am talking

(Testimony of Arthur Hanisch.)

about, at the time you acquired the title to "the Stuart formula" on November 28, 1942.

A. I placed no value on it whatever.

Mr. Mackay: If your Honor please, may I have the last question?

(The question was read.)

Mr. Mackay: If your Honor please, I object. There is nothing in the record to show that. The contract itself shows there was a quitclaim **without** warranty. I think the question is improper. It is not proper cross-examination.

Mr. Maiden: I think that is a weak objection, if the Court please, but I will put it this way—

Mr. Mackay: I don't want the record to show I am acquiescing to the trade name. Counsel here stated that at the time you acquired title—there is no evidence in the record to show that.

The Court: Objection sustained.

We will take a short recess at this time.

(Short recess taken.)

The Court: We will proceed. Will you reframe your question, Mr. Maiden?

Mr. Maiden: May I have the last question, please?

(The question was read.)

Mr. Maiden: I believe the Court sustained [164] the objection to that question. I am going to reframe it.

Q. (By Mr. Maiden): Now, were you inter-

(Testimony of Arthur Hanisch.)

ested at any time during 1941 or 1942 in acquiring part of, or the whole of whatever title Vita-Food Corporation had in, and to the trade name, "the Stuart formula"?

Mr. Mackay: May I have that question read, please?

(The question was read.)

Mr. Mackay: I think the evidence shows, your Honor, that there was no registration of the trade name until 1942.

Mr. Maiden: I am not talking about that, Mr. Mackay. I asked him if he was interested in acquiring whatever right or title Vita-Food might have had in and to this trade name.

The Court: You may answer.

Mr. Mackay: I think I will have no objection.

The Witness: I had discussions with Mr. Lewis on the matter of revising onerous conditions in the contract and at that time, in one or two of those discussions, he said, "I think probably we can work something out, which will give you title or part title to the trade-mark."

Q. (By Mr. Maiden): Then, your answer would be yes; is that right?

A. I had discussed it with him. [165]

Q. Well, I want to ask the question again. Were you actually interested in acquiring, either part or all of whatever title Vita-Food might have had in and to this trade name, at any time during 1941 and 1942?

(Testimony of Arthur Hanisch.)

A. As far as I can remember, I never made any proposition to him, in the nature of offering him anything for the acquisition of a trade-mark.

Q. I want to know whether or not you were interested in obtaining an interest in it?

A. In a vague way.

Q. What do you mean by "in a vague way"?

A. It didn't have any importance compared to the onerous part of the contract. Now, to me it was a very incidental interest, compared to the other situations that I wanted remedied.

Q. But you do admit an interest?

A. I admit a discussion with him.

Q. You admit an interest in a vague sort of way, is that right?

A. No, I would rephrase that. In an incidental way, very incidental to the important remedies I wanted.

Q. Now, Mr. Hanisch, how much money would you have given The Stuart Company in—we will say, in the summer of 1942, for whatever title it had in and to this trade name?

A. You mean what would I have given The Stuart Company? [166]

Q. Yes. I mean, what would you have given The Stuart Food Corporation? A. Nothing.

Q. You wouldn't have given them anything?

A. No.

Q. So that we have now definitely established it in this record, through your testimony, that you would not have given one plugged nickel for the acquisition of any part of whatever title Vita-Food

(Testimony of Arthur Hanisch.)

Corporation had in and to this trade name, The Stuart Formula; is that correct?

Mr. Mackay: Just a moment. May I have the question?

(The question was read.)

The Witness: I wouldn't have placed any value on it.

Q. (By Mr. Maiden): Now, did you feel, Mr. Hanisch, during and throughout 1941 and up until the time you entered into this agreement of November 28, 1942, that The Stuart Company was definitely losing ground and that you were faced with complete failure?

A. Yes, that it definitely was making no progress.

Q. Now, Mr. Hanisch, did you expect to start making money off of this product immediately upon opening business in the spring of 1941?

A. No. No business ever does that, that I know of. [167]

Q. Did you anticipate that there would be a development period necessary before you could show profits? A. Yes.

Q. How long a time did you estimate that it would take to establish this product on the market, in a profitable way, for The Stuart Company?

A. It is difficult to say, because it was a business of a type so different and new from anything that I was familiar with, that it is difficult for me to say what it would be. I went in there and did the best job I could.

(Testimony of Arthur Hanisch.)

Q. Would you say that you would have been surprised at a loss over the first year of the corporation operation? A. No.

Q. You would probably rather anticipate that, isn't that correct?

A. That is the nature of many businesses, that is right.

Q. Now, Mr. Hanisch, I believe the testimony shows that the Shaler Food Corporation was merged into The Stuart Company?

A. That is correct.

Q. On or about July 3, 1942?

A. That is correct.

Q. In other words, The Stuart Company took over all the assets and assumed all the liabilities of the Shaler Company? A. That is correct.

Q. The Shaler Company went out of [168] business? A. That is correct.

Q. Now, at that time was new stock issued by it, or additional stock issued by The Stuart Company?

A. At that time we voted, our Board of Directors voted, to issue stock. Now, the issue of stock actually didn't occur until some time later.

Q. I believe it probably is the substance of your testimony, that The Stuart Company never did get itself on a profitable basis, from the time of its organization up until you got out of this contract?

A. That is correct.

Q. According to your testimony—

A. Until we had a product that we had faith

(Testimony of Arthur Hanisch.)

in and that our customers had complete faith in.

Q. Up until the time of the agreement of November 28, 1942, you didn't consider your investment in The Stuart Company worth anything?

A. Worth very little, if anything.

Q. And you considered the prospects as practically nil, is that right, from a business standpoint?

A. Under this contract, I would have considered them practically worthless.

Q. Now, Mr. Hanisch, while we are on this point, I will ask you if it is not a fact that The Stuart Company applied to the Corporation Commissioner some time in the summer [169] of 1942, and I take it following the liquidation of the Shaler Company, for the right to issue additional stock?

Mr. Mackay: We will admit that.

Q. (By Mr. Maiden): And also for the right to issue some notes?

A. That is correct. I know an application was made; I don't know the details of that application.

Q. Who is Mr. Robert H. Dunlap?

A. He is our attorney, the company attorney, and at that time was an officer of the company.

Q. Do you know his signature?

Mr. Mackay: I will admit it.

Q. (By Mr. Maiden): Will you identify it?

A. That is Mr. Dunlap's signature.

Mr. Maiden: Now, if the Court please, we would like to read a statement from this letter of July 31, 1942, addressed to the Commissioner of Corporations——

(Testimony of Arthur Hanisch.)

Mr. Mackay: May I see the letter? Just a moment, are you going to offer it in evidence?

Mr. Maiden: Yes.

Mr. Mackay: I have no objection.

Mr. Maiden: If your Honor please, I would like to offer this letter into evidence, as Respondent's Exhibit C.

Mr. Mackay: No objection, your Honor. We will [170] admit it is the signature of Mr. Dunlap.

The Court: Received as Exhibit C.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. C.)

Q. (By Mr. Maiden): I hand you here a letter dated August 1, 1942, which purports to be written by you, Mr. Hanisch, to the Corporation Commissioner. I will ask you if you will identify that?

A. That is my letter and my signature.

Mr. Mackay: We will admit it, your Honor.

Mr. Maiden: If the Court please, I put myself in a very embarrassing position here. Those original letters belong to the Corporation Commissioner's file, and I had them withdrawn for the purpose of making photostats. I would like to substitute a photostatic copy for the original letter that went into evidence, as Respondent's Exhibit C.

The Court: Any objection?

Mr. Mackay: No objection.

The Court: You may do that.

Mr. Maiden: I would like to offer in evidence

(Testimony of Arthur Hanisch.)

as Respondent's Exhibit D, the letter dated August 1, 1942, just identified by Mr. Hanisch as having been written to the Corporation Commissioner by him.

Mr. Mackay: There is no objection. [171]

The Court: Received as Exhibit D.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. D.)

Q. (By Mr. Maiden): I will call your attention, Mr. Hanisch, to a paragraph in your letter of August 1, 1942, in which this statement appears: "Mr. Dunlap has informed me of his statement to you that the business of The Stuart Company is now on a profitable basis and has been for approximately sixty days last past. This is correct. He also informs me of your statement that your rules require that the new stock be escrowed unless a more favorable financial statement can be truthfully furnished."

Now, that was a misstatement of facts, Mr. Hanisch, when you stated that The Stuart Company was on a profitable basis at that time and had been for the past sixty days?

A. It was an inadvertent misstatement of facts on my part, occasioned by this: The man who was our certified public accountant, who was to establish these figures, was very late in getting to the job. He made a review of the figures, and assured me that those figures were correct and I, not being an accountant, must take the word of the man who

(Testimony of Arthur Hanisch.)

was that. I have subsequently found out that those two months that I said showed a profit, actually showed a loss, but it was a mistake, occasioned by an accounting—— [172]

Q. I believe this statement, which the letter shows was made by you to the Corporation Commissioner was in order to avoid the necessity of having to have this new stock put in escrow?

A. That is correct.

Q. I will ask you, was that stock issued by the Corporation Commissioner without being put under escrow? A. I believe that is correct.

Q. Now, Mr. Hanisch, I call your attention to a postscript on the letter, on the letter written by Mr. Dunlap to the Corporation Commissioner, as of July 31, 1941, which reads as follows: "The Stuart Company has been informed by wholesale drug dealers, that the product of that company has been a stand-out, and one large western distributor has informed the Applicant that its product is the fastest moving item, with one exception, Alka-Seltzer, that they have encountered in 15 years."

Would you say, or would you subscribe to that statement made by Mr. Dunlap?

A. I would have to give you a qualified answer, in this respect: That this happens to be an isolated jobber in the particular area, where Dr. Borsook and the California Institute of Technology have a good deal more prestige than any other place. Therefore, they did an outstanding sales job, which is not typical. [173]

(Testimony of Arthur Hanisch.)

Q. Who did an outstanding sales job?

A. This particular jobber we mention here, but it was not typical. Furthermore, that, to my mind, is no test or criterion of whether those sales had been done on a successful basis, because we did it on a matter of price and if you sell diamonds at \$10.00 a carat, you certainly can sell them, but that doesn't make your business a success.

Q. Now, Mr. Hanisch, coming back to the Petitioner's Exhibit 8, which is this contract of May 5, 1941, I believe you stated that this was the result of several conferences, and, at least, was the final of one previous draft anyway.

A. That is correct.

Q. I believe you stated that you read through this agreement and that, notwithstanding some advice by some business associate, that you were agreeable to entering into that contract.

Did you carefully consider each of the provisions in the contract, Mr. Hanisch?

A. I did, and I foresaw dangers that might occur if I were not dealing with completely reliable people.

Q. Now, I believe that paragraph two of this, that is numbered paragraph two, which appears on page 3, that this paragraph specifically provides that the trade-mark or label "the Stuart formula" was the property of Vita-Food Corporation. That is the meaning, in substance, of that paragraph. is that [174] correct? A. That is right.

Q. And you so understood that to be a fact at

(Testimony of Arthur Hanisch.)

the time, as between you and Vita-Food Corporation; you laid no claim or right to the ownership of that trade name at that time?

Mr. Mackay: If your Honor please, I object to that. I think counsel is arguing.

Mr. Maiden: Mr. Mackay, I was very kind to you. I didn't interrupt you.

Mr. Mackay: I am sorry I interrupted. May I have the last question, please?

(The question was read.)

The Witness: Will you repeat the question again, please?

(The question was reread.)

The Witness: I still don't get it. Will you read it again?

(The question was reread.)

The Witness: That is correct.

Q. (By Mr. Maiden): It was your understanding, then, that that trade name was to be and was at that time, the property of Vita-Food Corporation?

A. That is correct. [175]

Q. Now, Mr. Hanisch, you keep talking about onerous provisions of this contract, and I presume that you have certain provisions in there in mind. Did it occur to you at the time you entered into that contract, that any of the provisions would work a hardship on you?

A. Not on the ones that really worked the greatest hardship.

(Testimony of Arthur Hanisch.)

Q. Which ones were they?

A. The ones that specifically stated that I could not purchase vitamins from anybody but the Vita-Food Corporation, regardless of price, quality or anything else.

Q. Now, you understood that to mean that you couldn't do that so long as you were operating under that contract, isn't that right?

A. That is correct.

Q. Now, Mr. Hanisch, I don't believe—I may be wrong—but I don't believe that Mr. Mackay—he probably forgot it—brought out through your testimony anything about any notice of cancellation of this contract, having been issued to you in 1942.

A. He did not.

Q. By the Vita-Food Corporation?

A. He did not bring it out.

Mr. Mackay: I didn't forget it. I had another witness who is more familiar with it. [176]

Mr. Maiden: I see.

The Court: Was that a fact; were you given notice in 1942 that you had defaulted in the contract, that is, were you given a notice of termination?

The Witness: Yes, October, 1942.

Q. (By Mr. Maiden): Did you acknowledge receipt of that notice, under date of October 12, 1942, Mr. Hanisch?

A. Yes. I have a copy of the letter here, if I may read it, the acknowledgment——

Mr. Maiden: Well, I presume——

(Testimony of Arthur Hanisch.)

Mr. Mackay: Just wait. He is asking you if you received it.

The Witness: Yes, I received it.

Q. (By Mr. Maiden): Now, pursuant to a conversation which you had with Mr. Lewis, in the spring or summer of 1942, about acquiring an interest in the name, "the Stuart formula," did Mr. Lewis have drafted a new contract that would take place of the May 5, 1941, contract?

A. Yes, he submitted a proposed draft in August, 1942, which was completely unsatisfactory, because it did not remedy the important points that I objected to in this operating arrangement. It did mention trade-mark, but not the important things. I did not accept it. [177]

Q. You weren't interested in the trade-mark part of that agreement?

A. There was an arrangement there to give us an interest in it, but other features of the contract were so objectionable that we simply threw it back and said that we couldn't accept it.

Q. I will ask you if it isn't a fact that the re-writing of the May 5, 1941, contract wasn't prompted by your statement to Mr. Lewis, that you would not go on with the promotion of this vitamin concentrate unless and until—that is on a national basis—unless and until you received a half interest in the title to the trade name or trade-mark "the Stuart Formula"?

A. That was the thing that came up in the dis-

(Testimony of Arthur Hanisch.)

cussion, but the onerous factors of this contract were the things I objected to. I could not operate under this contract, whether I had the trade-mark or not.

Q. Now, Mr. Hanisch, I will ask you if you didn't refuse to accept the rewriting of that May 5, 1941, contract for the sole reason that under the proposed redraft of the contract, in that part of the provisions whereby the Vita-Food Corporation was to give you a half interest in the trade-name "the Stuart formula," the provisions further provided that unless you maintained the specified quota of purchases set out in the proposed redraft, your one-half of this trade-mark [178] would revert in the Vita-Food Corporation?

A. I do not recall that that was the reason. I discussed it with my attorney and we had 15 or 20 points of variance on this thing, in which we did not get the remedy we wanted. We simply turned the whole thing down.

Q. Now, I believe you stated that you didn't have any reliance at any time upon the financial stability of the Vita-Food Corporation?

A. I don't believe that is a completely correct statement. I think up to the time that I first was told that account should be guaranteed, I did have faith that they had the financial ability to carry out the commitments they went into under this contract.

Q. Now, while we are right there on that point, I believe you said something about guaranteeing

(Testimony of Arthur Hanisch.)

the credit or the financial responsibility of Vita-Food Corporation.

A. That is correct, to one supplier of the bottles, only.

Q. Did you put that in writing or anything?

A. I did not.

Q. How much did the credit amount to?

A. I wouldn't know, because I wouldn't know what they were paying for the bottles. He simply said he would not supply them unless I would give that guarantee verbally to him.

Q. You didn't underwrite any credit of Vita-Food Corporation to anybody else? [179]

A. No.

Q. Or at any other time?

A. As far as I remember, no.

Q. Now, did Vita-Food Corporation, ever, at any time, that is, prior to the agreement of November 28, 1942, find itself in a position of not being able to deliver to you when ordered by you at the time specified for delivery by you, the vitamin concentrates?

A. Oh, there might have been a delay of a few days, but never to the point where it embarrassed us.

Q. Now, you have already testified that you never did fill your quota?

A. That is correct.

Q. I will ask you whether or not the Vita-Food Corporation, through Mr. Lewis, was at all times urging you to push your promotion of sales, in order for you to be able to meet the minimum requirements?

(Testimony of Arthur Hanisch.)

A. Oh, yes. He was very eager to have us do that. As a matter of fact, he would have had us go into territories twice as big as we had in the country, but I was loathe to do that with an unsatisfactory product.

Q. In other words, at all times, you admit, that Vita-Food Corporation was willing and able to furnish you all of the vitamin concentrates that was required by your business?

A. I have no way of knowing that, because I never saw [180] the plant. I wouldn't know the capacity of the plant. I don't know what they could produce.

Q. All you know, you never placed an order with them that wasn't fulfilled? A. That is correct.

Q. Now, Mr. Hanisch, I believe you stated that one thing about the financial stability of the Vita-Food Corporation that had you worried, was in connection with the explosion of these bottles; that you didn't want to have to assume the financial responsibility in connection with exploding bottles and returned merchandise, is that right?

A. That is correct.

Q. That was one feature of the contract that you didn't like, is that right?

A. That was one feature that had me worried, because I felt that if at some time we had a terrifically large return and the company, Vita-Food Corporation, were not capable—if they were not in

(Testimony of Arthur Hanisch.)

a good financial position, I had no recourse. That is why it was an important issue to me.

Q. Now, I am going to ask you to look at the contract of May 5, 1941, and see if you don't find in there, a specific provision that the Vita-Food Corporation would carry insurance with respect to those products, and covering the very thing about which you have just now testified?

A. I know the situation you refer to, and that was [181] known——

The Court: Will you look at the contract?

The Witness: What paragraph is that?

Q. (By Mr. Maiden): It is toward the end, about the third page from the end, sir.

A. Yes, it is on page 10, paragraph 18, if that is the one you mean.

Q. That reads: "It is understood that second party now has a policy of product liability insurance, a copy of which has been delivered to first and third parties——" and that would be you and the corporation?

A. That is correct.

Q. (Reading further): "——the receipt whereof if hereby acknowledged and that the form and amount of such policy is satisfactory to first and third parties; and first and third parties agree to pay to second party on demand such additional premiums as are or may be charged under said policy for coverage of first and third parties."

A. You are asking this question in connection with the previous question?

(Testimony of Arthur Hanisch.)

Q. Yes.

A. I think you have a misconception of what product liability insurance is. Product liability insurance means this: That, if you or your child would swallow some of this [182] stuff and you are injured, you have insurance on that, but it does not provide for bad merchandise. Say, if \$20,000.00 of it blew up, or I had to return it, it does not insure against a return of merchandise. It does give you protection. We had one attempted case where a mother claimed a child swallowed some glass. That is what this covers. It would not cover what you are talking about.

Q. I am glad you pointed that out, because that had puzzled me.

A. We carried that policy——

Q. Isn't it a fact that the Vita-Food Corporation—strike that. Isn't it a fact that all of the damage that you suffered by reason of bottles exploding and labels being damaged, and any damage that might have been done in the inside of a drug store or wherever the product might have been, that the Vita-Food Corporation took personal responsibility and assured liability of all of that; and I will ask you, if, as a matter of fact, they didn't in each and every case, make full and complete restitution?

A. That is correct. You said for all damages. Now, I can think of damage being done to us, due to the fact that a doctor prescribed a product, which gave that patient indigestion. There is an intangible

(Testimony of Arthur Hanisch.)

type of damage that he could not possibly cover. It is a damage to our prestige.

Q. You knew, Mr. Hanisch—or at least it was being [183] represented to you, that the Vita-Food Corporation was working all of the time, trying to improve this particular product that it was selling to you?

A. That is correct. That is the reason I had such patience.

Q. Did you understand that Dr. Borsook was assisting in the efforts being made to cut out these so-called defects?

A. That is right. I understood he was interested in trying to iron out these problems.

Q. Now, weren't they making progress?

A. As far as we could find out, no.

Q. You say that up until the time of this instrument of November 28, 1941, that——

A. 1942.

Q. 1942—that they had not made these corrections in the product and had not perfected the malt base?

A. No, we never had a product from them with a malt base. They might have had it, but we never did.

Q. I will ask you if it is not a fact that under this contract of May 5, 1941, the Vita-Food Corporation wasn't bound to sell through you all of their products?

A. That is not true. There was a qualification——

(Testimony of Arthur Hanisch.)

there were two qualifications, as I recall it. They were bound to us to sell the products recited here in the contract, but they had a provision on a product which they had already had on [184] the market, prior to the inception of the Stuart, called "Vitall."

The provision in the contract reads this: That we were allowed to sell Vitall outside of Los Angeles County, they reserved the right to sell it in Los Angeles. When and if the total sales we made for the Vita-Food Corporation reached \$2,000.00 a day, then, we were to make a deal to get the Vitall. There was another exception. They could develop new products. They would offer new, original products to us and, unless we agreed to market them within ten days after offering, they could offer it to somebody else. They also reserved the right to sell to certain government agencies.

Q. I think the contract will speak for itself.

A. I thought you asked me.

Mr. Maiden: I didn't mean to take up that time, your Honor.

The Witness: I am sorry.

Q. (By Mr. Maiden): Now, Mr. Hanisch, I believe the penalty under this contract of May 5, 1941, for your failure to meet the quota as required was simply the cancelling of that contract by Vita-Food Corporation?

A. That is the way I would read the contract. The complete cancellation of the contract.

Q. Now, I am interested to know why it is that,

(Testimony of Arthur Hanisch.)

if that [185] was the fact and that if you were so dissatisfied with this product, why you didn't cut down on your purchases of the concentrate from the Vita-Food Corporation to the extent that the Vita-Food Corporation would cancel that contract on you?

A. We didn't do it. We did our best to live up to the essence of that agreement.

Q. Notwithstanding the fact that you were dissatisfied with it and felt like it wasn't worth anything?

A. There was nothing—it served no purpose to us to get a cancellation of that contract because I had become by that time interested in the potentialities possible in the pharmaceutical field, with the proper products. However, under that contract, I could not be in this business without buying from them, regardless of what we were letting—

Q. Well, Mr. Hanisch, you say you were not interested in a cancellation then?

The Court: Now, Mr. Maiden, I want to have this answer read back, because part of the question will involve this contract and the parties to this proceeding are going to ask the Court to make an interpretation of this contract. The contract is going to have to speak for itself, to a very large extent.

Now, paragraph 7 provides—this is Exhibit 8, “First parties shall handle no other products than those manufactured or produced by second party, and shall be the sole [186] distributors of all prod-

(Testimony of Arthur Hanisch.)

ucts manufactured or produced by second party, except as herein otherwise provided.”

Now, I will call counsel’s attention to that clause, and I ask counsel to consider again the witness’ answer and decide whether you want to ask the witness another question. Read the answer.

(The answer was read.)

Mr. Maiden: I think I understand what the Court has in mind. I believe I previously elicited the answer from Mr. Hanisch.

The Court: All right. Now, Mr. Hanisch as long as this contract stayed in existence, you were bound by the terms of it?

The Witness: That is right.

The Court: Didn’t you understand that as long as this contract was in existence, you were restricted to sell only the products of Vita-Food?

The Witness: That is correct.

The Court: Now, did any lawyer ever tell you or did you ever have any understanding, that this contract meant that you could never sell any pharmaceutical products in the United States for the rest of your business life, whether or not this contract was cancelled?

The Witness: I was told—the contract——

The Court: Just pay attention. As long as [187] this agreement stayed in existence, you were bound by the terms of it; isn’t that correct?

The Witness: Yes.

(Testimony of Arthur Hanisch.)

The Court: When the agreement was cancelled, whatever circumstances it would be cancelled for, you would be free from the contract. Now, you would be free from all the provisions of the contract, isn't that true?

The Witness: That is what we preferred.

The Court: No. Mr. Mackay, your witness has argued with everyone all day long.

Mr. Mackay: Please answer the question.

The Court: Please instruct your witness that it is a rule of procedure in all the courts that the witness answers the questions, and they do not argue with counsel or the Court. Now, Mr. Hanisch has been debating his case all day long with counsel, instead of answering questions. The Court is trying to get the facts.

The Witness: I am sorry.

The Court: Your lawyer will argue his case in his brief. Instruct the witness.

Mr. Mackay: Please listen to the Court and just answer the questions without any argument.

The Witness: Yes.

The Court: Was it your understanding that when this contract ended, for whatever cause it ended, you were released [188] from every covenant you ever made in the contract?

The Witness: That is right.

The Court: Therefore, if the Vita-Food people terminated the contract because you didn't live up to your agreement to sell a large enough quota, then

(Testimony of Arthur Hanisch.)

you would be free to go out and sell other products?

The Witness: That is correct.

The Court: And counsel just asked you why you weren't perfectly willing then to have Vita-Food terminate the agreement on you. Now, why weren't you?

The Witness: Because the contract was not cancelled in total. It was cancelled according to one provision. However, in their letter——

The Court: That wasn't counsel's question. You see, you argue.

The Witness: Will you rephrase the question?

The Court: If you really will listen to the question, I think perhaps you would answer, but I don't think you want to listen to them, do you? The question is, why were you unwilling then to let Vita-Food serve on you a termination of the contract? The question has nothing to do with any eventual termination. Mr. Maiden was asking you a question, in the nature of a hypothetical question, and his question was: Why, if you were dissatisfied, didn't you use the contract itself for Vita-Food—for letting Vita-Food terminate the [189] contract, let the contract operate in its terminating features, let them cancel the contract. Now, "cancel the contract" means "cancel the contract." It means cancelling all of the contract. Now, I wonder if you really would try to answer that question and not argue about it. Of course, you can always say that you do not care to answer the question or that you cannot

(Testimony of Arthur Hanisch.)

answer the question, but the question is a perfectly simple question.

The Witness: I understand it now, the way you phrased it, and I would answer that by saying, I would have liked to have that contract cancelled in its entirety.

Mr. Mackay: May I make a suggestion? Of course, the witness has been on the stand for a long time. He has been on the stand from 10:00 this morning until a quarter of six.

The Court: You think that we should recess, Mr. Mackay? The reporter will mark the last question and the last answer and I would like, for the purpose of the record, Mr. Mackay, to say that the reason I have asked the witness these questions and pointed out that he tends to be argumentative, is this: When the record has to be read by the Court and by counsel, and I have had to say this before during the day, these argumentative answers spoil the record, because we do not have any decisive answers and we might just as well not have a trial if, at the end of the trial, both parties are not going to be [190] in a position to argue about what is in the record.

I want to point out to this witness himself, that one of his answers did not conform with one of the requirements of the contract, and that one of his answers was absolutely wrong; that any intelligent business man would know that when a contract ter-

(Testimony of Arthur Hanisch.)

minated, he could go out and sell Bromo-Seltzer or any other product he could get the agency to sell.

Mr. Mackay: Yes, your Honor.

The Court: We will adjourn until 2:30 p.m. tomorrow.

(Whereupon, at 6:00 o'clock p.m., an adjournment was taken until 2:30 o'clock p.m., Thursday, January 29, 1948.) [191]

January 29, 1948

The Court: Proceed.

Whereupon,

ARTHUR HANISCH

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: Will you read the last question, please?

(The record was read.)

The Court: I think you had better start in again if you want to pursue that. Ask the question over again.

Cross-Examination

(Continued)

By Mr. Maiden:

Q. Mr. Hanisch, first I want to ask you to identify a letter from The Stuart Company, dated October 12, 1942, to The Vita-Food Corporation.

(Testimony of Arthur Hanisch.)

A. Yes, that is my signature and a letter from The Stuart Company.

Mr. Maiden: If the Court please, I would like to offer this in evidence as Respondent's exhibit next in order.

The Court: Exhibit E.

(The document above referred to was received in evidence and marked Respondent's Exhibit E.)

The Court: What is Exhibit E?

Mr. Maiden: If the Court please, Exhibit E is a [193] letter from The Stuart Company to The Vita-Food Corporation which acknowledges the receipt by The Stuart Company of The Vita-Food Corporation's service of notice of cancellation of the contract; that is, the contract of May 5, 1941.

The Court: What is the date of the letter?

Mr. Maiden: Date of the letter is October 12, 1942.

The Court: Received as Exhibit E.

Q. (By Mr. Maiden): I will ask you if you will identify for the Court, Mr. Hanisch, this document which is entitled "Notice of Rescission."

A. May I read it?

Q. Yes. A. Yes, this is my signature.

Mr. Maiden: I would like to offer this in evidence, if the Court please, Respondent's Exhibit F.

Mr. Mackay: I have no objection. Do you have an extra copy of this—oh, we have a copy.

(Testimony of Arthur Hanisch.)

The Court: Received as Exhibit F.

(The document above referred to was received in evidence and marked Respondent's Exhibit F.)

Mr. Maiden: I might state for the benefit of the Court that this Exhibit F, Respondent's Exhibit F, designated "Notice of Rescission," is addressed to The Vita-Food Corporation and M. H. Lewis, and it is signed The Stuart Company, [194] by Arthur Hanisch, its agent, and Arthur Hanisch by Arthur Hanisch. The import of the exhibit is that The Stuart Company and Arthur Hanisch "hereby rescind that certain agreement dated May 5, 1941, by and between Vita-Food Corporation, Shaler Food Products Company, The Stuart Company and Arthur Hanisch; and the said Arthur Hanisch does hereby rescind the transfer of 15 per cent of The Shaler Food Products Company stock and 15 per cent of the capital stock of The Stuart Company to M. H. Lewis.

"That said rescission is based upon the following grounds: 1. Fraud in the inception of said contract; 2, failure of consideration in its performance; 3, mutual mistake."

Q. (By Mr. Maiden): Mr. Hanisch, it is a fact, then, that as of October 8th and October 12th—that is, by October 12, 1942, the contract of May 5, 1941, was in the process of termination under and within the terms of the contract?

(Testimony of Arthur Hanisch.)

A. I do not believe that to be completely correct, in that only one paragraph was cancelled. That is, I think it is paragraph 7, which refers to our exclusive selling rights. In our reply, we did not recognize Vita-Food's right to use the intermediary step, that is, cancel the contract in part.

Q. The substance, then, of your letter of October 12, 1942, was that you would try to make up the deficiency in your quota? [195]

A. That is correct.

Q. But that you had doubts of your ability to make up the deficiency? A. That is correct.

Q. And that you took the position that the contract was cancelled as of the date of your letter for all purposes?

A. That is correct, if it could be cancelled. We maintained that they could not cancel one part of the contract.

Q. In other words, it was your position that at 60 days from and after October 12, 1942, the contract should and would be cancelled for all purposes? That was the position you took?

A. Yes.

Q. Now, Mr. Hanisch, at any time after the notice that you gave Vita-Food Corporation, as of October 12, 1942, which is Respondent's Exhibit E, did The Vita-Food Corporation or any representative of The Vita-Food Corporation advise you or The Stuart Company or any official of The Stuart Company that the Vita-Food Corporation did not

(Testimony of Arthur Hanisch.)

accept and would not accept your cancellation notice of October 12, 1942?

A. I do not recall, because in those negotiations and meetings they were held between the two attorneys and I was only at the two final meetings.

Q. So, as far as you know, then, personally, The Vita-Food Corporation did not take the position that your notice of [196] October 12, 1942, was not a good notice?

A. To my personal knowledge, no.

Mr. Mackay: If your Honor please, counsel has called my attention to a complaint which was filed in the Superior Court of the State of California, in and for the County of Los Angeles, between The Vita-Food Corporation, a corporation plaintiff, versus Arthur O. Hanisch, The Stuart Company, a corporation; Donald B. Hops and others, which complaint bears the number 482045, which was filed—there is the filing date of November 25, 1942. I have a copy of the complaint and the exhibit attached to the complaint, photostatic copy, which I intended offering by another witness, as our exhibit. I now offer it in evidence, if your Honor please.

Mr. Maiden: And it is in evidence as proof of all of its contents? That is, I don't understand that you would agree that the allegations set forth in the petition are true?

Mr. Mackay: Oh, indeed not. We don't agree they are true. All we are putting in this exhibit for is to show that the complaint was filed and what

(Testimony of Arthur Hanisch.)

is alleged therein. All the allegations are contrary to the evidence we have put in and which we shall put in later.

The Court: Received as Exhibit 15.

Mr. Mackay: That is a certified copy.

(The document above referred to was received in evidence as Petitioner's Exhibit No. 15.) [197]

Q. (By Mr. Maiden): Now, Mr. Hanisch, I believe on your examination yesterday, either on direct or cross, probably on cross, you stated that prior to the execution of the instrument dated November 28, 1942, that no dispute had arisen between The Stuart Company and The Vita-Food Corporation, with respect to the ownership of the trade name or mark, "the Stuart formula"; is that correct?

A. That is correct, with a qualification. I must qualify that, in that after sometime in September, I did not meet any member of The Vita-Food Corporation until I talked to Mr. Wiseman in our settlement arrangement.

Q. Now, Mr. Hanisch, I would be interested in you explaining to the Court when it was that you conceived the idea of laying a claim to ownership of the trade name or mark, "the Stuart formula"?

A. It occurred as soon as I was completely aware of my position, due to the disillusionment I had as a result of faulty merchandise, a price structure which was unrealistic and complete realization that I was in hoaxed position. At that time I made it my busi-

(Testimony of Arthur Hanisch.)

ness to find out what my rights were, under this situation, and through my counsel I proceeded to find out what my rights were under the trade-mark situation. We immediately consulted our trade-mark attorney, who was recommended by Mr. Dunlap, my counsel. [198]

Q. Why were you interested in this trade-mark or name, "the Stuart formula" at that time?

A. Because we wanted to know what our rights were under this thing in every respect, and that was one incident in determining what our rights were.

The Court: Would you ask the witness when he first became interested in making this claim? He said why, but he didn't tell you when.

Mr. Maiden: Thank you, your Honor.

Q. (By Mr. Maiden): Will you tell me when you first became interested in making a claim?

A. I am sorry, but I can't give the exact date. It was sometime subsequent to the middle of September.

Q. Now, why did you become interested?

A. It was one of the incidents of finding out what my rights were in a potential dispute.

Q. Well, will you just explain that—how the question of your claiming ownership of "the Stuart formula" had anything to do with determining your rights under the contract?

A. We realized there was a potential litigation on the whole contract and the trade-mark thing was one paragraph in the contract. Therefore, it had to

(Testimony of Arthur Hanisch.)

be considered just as every other paragraph in that contract was, and had to be considered. [199]

Q. But you weren't interested in obtaining—did I understand from your conversation yesterday that you weren't interested in obtaining the title to the trade-mark?

A. That wasn't the point at issue. We were examining that contract. We realized there was a potential lawsuit predicated on cancellation of that contract, or a dispute over the contract. That being one part of the contract, we considered it just as we considered every other clause of that contract.

Q. That potential litigation was in the offing?

A. We knew there was a dispute. We had a notice of cancellation of the contract in part. That is the one paragraph—Paragraph 7. We did not agree with that position, however, and naturally we assumed there would be a dispute in the matter.

Q. Did you make any effort to determine from Vita-Food Corporation whether they intended to try to hold you to all of the contract, with the exception of one particular part?

A. I cannot answer that because, as I stated before, all of the discussions on those legal points were between their counsel and our counsel.

Q. Now, what was your chief interest at that time?

A. My chief interest was to get out of it—get a cancellation, get out of an onerous contract under which I could not operate.

(Testimony of Arthur Hanisch.)

Q. That was all you were concerned with? [200]

A. That was absolutely all I was concerned with.

Q. Will you tell me why it was that you were concerned with the title to this trade-mark?

A. I was not concerned with the title—of acquiring the title. I was concerned in finding out what that thing meant in the contract and what we had to do about it, as we had to consider every other part of that contract.

Q. If all you were interested in was a cancellation of this contract, why would you yourself be interested in determining whether or not you could establish ownership of the trade-name, “the Stuart formula”?

A. That is the thing that was revealed to us when we made examination of what the trade-mark part of the contract meant. We went to a trade-mark lawyer to find out what the implication of that paragraph was and then he came out and volunteered the information that the ownership did not vest in Vita-Food at all and it was their revelation to us. We didn’t ask for it.

Q. You mean, in other words, you and your associates in The Stuart Company didn’t understand that part of the provision in the contract of May 5, 1941, dealing with the question of the ownership of the trade-mark, “the Stuart formula”?

A. My attorney advised us to get expert opinion on that phase of it.

Q. Well, I don’t care about what your attorney

(Testimony of Arthur Hanisch.)

advised [201] you to do. I want to know what was there about that provision in this contract of May 5, 1941, respecting ownership of this trade-mark that you didn't understand.

A. It was purely a matter—let me read it.

Q. It is Paragraph 2.

A. There was another point that I recall. We did not know whether there had been actual issuance of the trade-mark. If it actually hadn't been issued, that would probably have to be considered in this cancellation situation and our trade-mark attorney was instructed to find out what the nature of the trade-mark was. That is when we were informed that the trade-mark was not the property of Vita-Food Corporation, but we did not go there for the purpose of acquiring the trade-mark.

Q. What difference did it make to you, Mr. Hanisch, or to The Stuart Company whether The Vita-Food Corporation had registered this trade name?

A. My attorney informed me that it was important in planning the suit that we were planning to bring against them.

Q. But, Mr. Hanisch, you have stated that in the very beginning you recognized that this trade-mark should be the property of Vita-Food Corporation.

A. That was—you say, in the beginning? What are you referring to?

Q. Well, in Paragraph 3. I mean in Paragraph

(Testimony of Arthur Hanisch.)

2 of the [202] contract of May 5, 1941, it is stated——

A. You mean that is the beginning? This contract——

Q. Yes.

A. That I recognized the ownership?

Q. Yes. A. Yes, I did.

Q. And you signed this contract, didn't you?

A. I did.

Q. Recognizing this ownership?

A. That is correct.

Q. You never questioned this ownership to The Vita-Food Corporation at any time prior to the date I have previously mentioned?

A. Not at that time, and I never was interested in any respect until I was disillusioned and found out there had been so many violations. Then I wanted to determine what my rights were under the contract.

Q. In other words, when—in the summer, the fall rather of 1942, when you became interested in this trade-mark question, it was your intention for your company to go into court, undertake to take away from The Vita-Food Corporation a property right which you had at all times recognized and had agreed that belonged to The Vita-Food Corporation?

A. That is not correct to say that that was our intention. We did not plan to do anything definitely on that [203] situation until I was served with a

(Testimony of Arthur Hanisch.)

summons on—I don't know the date. I think it was November 26th. Anyway, The Vita-Food attempted to get an injunction preventing us from marketing merchandise using that trade-mark. Shall I amplify that a little more?

Q. Why would that injunction suit, which I understand and which will show from the record was solely for the purpose of enjoining you from selling vitamin concentrates that had not been manufactured by Vita-Food Corporation under the trade name "the Stuart formula," cause you to contemplate bringing a suit against The Vita-Food Corporation having as its purpose the wresting from them a property right which you had agreed they had from the very beginning?

A. That was only part of our cross-complaint. We felt that we had been injured, in that they cancelled only one paragraph of that agreement. We, therefore, had to establish our rights completely under that agreement.

Q. Now, Mr. Hanisch, you say in your cross-complaint—did you ever file any cross-complaint?

A. No, we had it——

Q. In the injunction suit?

A. No, we had it in the course of preparation when Mr. Wiseman and Mr. Dunlap finally got together on their conference, which led to settlement.

Q. Then, I believe it is established here that until [204] this injunction, the notice of this injunc-

(Testimony of Arthur Hanisch.)

tion was served on you, you had no intention of filing a law suit, undertaking to take away from The Vita-Food Corporation the title to the trade-mark?

A. No, that is not completely correct, because Mr. Dunlap had prepared a suit in which the trade-mark matter was mentioned, and that was part of his plan in the suit.

Q. Well, do you know when Mr. Dunlap prepared that?

A. I couldn't tell the exact date. I know he worked on it, I think, in October and November. I couldn't tell you the exact dates.

Q. Did it occur to you, Mr. Hanisch, that after once recognizing the property right of Vita-Food Corporation in and to this trade-mark, as you specifically did in the contract of May 5, 1941, that you would be guilty of bad faith?

A. Shall I answer that?

Q. Yes.

A. No, I was not guilty of bad faith. May I amplify that?

Q. Yes.

A. This whole arrangement, as I explained in direct examination yesterday, was predicated on the business of good faith. When I found out that many things had been done which were not in keeping faith with this agreement and the agreement made with me, I started to find out what my rights were. [205]

(Testimony of Arthur Hanisch.)

Q. Suppose you and I enter into a business transaction, Mr. Hanisch, and suppose we set up the complete business arrangement that is to prevail between us, and suppose that an agreement involves a situation similar to what we have here and it is agreed that you are, that you own and are to own this particular piece of property that I claim no title to——

Mr. Mackay: If your Honor please, I object to that question as being argumentative; also compound; assuming facts not in the record. I don't like to limit counsel's cross-examination, but I think his examination ought to stay as nearly as possible to the facts in the record. This is all assumption; also compound and argumentative, and I think it is not proper cross-examination.

The Court: It is proper cross-examination. Your objection is overruled.

Mr. Maiden: Read the question, please.

(The question was read.)

Q. (By Mr. Maiden): ——and then a year or two later you and I have some disagreements as to the operation of this business. Would you consider it bad faith upon my part——

A. Under certain——

Q. Just a second. A. Excuse me.

Q. ——if simply because I didn't like the way the business [206] arrangement had worked out, I then asserted a claim to this piece of property and undertook to take it away from you?

(Testimony of Arthur Hanisch.)

A. Under certain circumstances, I could answer that yes. However, if misstatements, deliberate misstatements at the inception of this contract made me go into a thing which caused me damage, I think I am entitled to look out for my rights under that, and see if I can get out from under it on the basis of complete misrepresentation.

Q. But all you wanted to do here, you say, was to get out from under the contract.

A. Absolutely. I could not operate under this contract.

Q. Well, how did you calculate, then, that laying a claim to the trade-mark "the Stuart formula," if you weren't interested in that trade-mark, would help you get out of the contract?

A. That was part of the general situation in the contract, but the only thing I asked our attorney to do was to get me out of a contract under which I could not operate.

Q. Mr. Hanisch, didn't it occur to you to wait and let the time for the termination of the contract arrive under the notices that had been passed between the parties before you entered into this kind of litigation or set up any claim or anything of that nature?

A. I don't believe that is a completely correct statement, in that the contract was not cancelled; just one clause [207] of that contract was cancelled and in every other respect it was in effect.

The Court: Mr. Maiden, there hasn't been offered in evidence the notice of Vita-Food Corpora-

(Testimony of Arthur Hanisch.)

tion that considers the contract in default, and giving notice of rescission. Mr. Hanisch states that he considers the notice of rescission related to cancellation of only part of the contract, whereas he contended in receiving, in acknowledging receipt of that notice, that it terminated the contract for all purposes.

Now, he said in his letter, Exhibit E, also he said this: “—and we do not concede the existence of any such intermediate procedure as you suggest.”

Now, what was he talking about when he referred to “intermediate procedure” and what did Vita-Food Corporation state in its notice of termination?

Mr. Maiden: If the Court please, the letter of The Vita-Food Corporation to The Stuart Company on date of October 8, 1942, is in evidence as a part of Petitioner’s Exhibit 15.

The Court: That was offered after Exhibit E was, and the Court has not had this brought out in the record. I think you had better read that into the record, and I think we ought to get this fact cleared up before you go into any more cross-examination.

Mr. Maiden: If the Court please, the letter [208] of October 8, 1942, from The Vita-Food Corporation to The Stuart Company reads as follows:

“Gentlemen:

“In view of the position expressed by Mr. Hanisch for the first parties concerning national distribution, its development and organization, and as to your defaults in performance of

(Testimony of Arthur Hanisch.)

the above-described contract, we invoke the intermediate step provided in Paragraph 6 of the contract. You have failed substantially to meet your agreed commitments, although additional time has been granted to you by prior quota suspensions.

“You are each hereby notified that you have failed to meet your quotas for the sixty-day period from and after August 1, 1942, and therefore your exclusive right to sell under the said contract is hereby terminated in accordance with paragraph 6 thereof. This termination shall be effective sixty (60) days after the service of this notice. In all other respects, the contract remains in full force and effect.”

This is signed by Oscar Z. Wiseman, vice-president of the Vita-Food Corporation.

The Court: What do they mean by “all other respects”?

Mr. Maiden: If the Court please, I will explain that very briefly. [209]

The Court: This contract was just a contract for sale of the product by The Stuart Company.

Mr. Maiden: Paragraph 6 of this contract to which reference was made in that letter——

The Court: Well, I have Paragraph 6.

Mr. Maiden: ——provides that The Stuart Company is to have exclusive right to sell said Vitaplex and Stuart formula until November 1, 1941.

In other words, they had the exclusive right to sell those two products. And it provides that in

(Testimony of Arthur Hanisch.)

case they fail to meet the quota with respect to these products that Vita-Food could cancel that exclusive right, and that is the paragraph to which reference was made in the letter.

Now, Paragraph 19 of the contract provides as follows:

“This contract shall remain in full force and effect for the period of 10 years from and after the date hereof, and may be extended at the option of First Parties for an additional period of 10 years by written notice to Second Party, such notice to be given not less than three months before the expiration of said first 10-year period, provided, however, that this contract may be terminated by Second Party if for any 60 consecutive days, at any time after November 1, 1941, First Parties shall not [210] have purchased the minimum quantities of products hereinbefore specified in Paragraph 6 hereof, upon 60 days’ notice of intention so to do, unless during such 60-day period any such deficiency shall be removed and the minimum quantities aforesaid ordered and paid for; otherwise, all rights of First and Third Parties hereunder shall cease at the expiration of the 60-day period specified in such notice of termination.”

In other words, if the Court please, the purpose of the letter of October 8, 1942, was to serve notice of cancellation of The Stuart Company’s exclu-

(Testimony of Arthur Hanisch.)

sive right to use this Stuart formula; that is, the vitamin concentrate sold under that name. That would leave the situation that The Stuart Company could continue to use "the Stuart formula," in competition with any other parties or concerns desiring or making arrangements with Vita-Food Corporation to sell the product under that name.

Now, Paragraph 19 provides for the cancellation not only of The Stuart Company's exclusive right, but also of the right of the parties, that is, all rights of the parties under the contract.

Now, if the Court please, Exhibit 15 is the injunction suit, brought against The Stuart Company and Mr. Hanisch on November 25, 1942. This is very important. [211] The only purpose of this injunction suit was to restrain the Stuart Company from selling vitamin concentrates under the name, "the Stuart formula," which vitamin concentrates The Stuart Company had not purchased from The Vita-Food Corporation.

In other words, this injunction suit did not undertake to restrain the Stuart Company from purchasing all of the vitamins that it wanted from any other party, and selling it under any name, so long as they didn't use the name "the Stuart formula."

I might call your attention to the fact that in this injunction suit, no damage or anything of that kind is requested. All they were undertaking to do was to keep The Stuart Company from operating this trade-mark.

(Testimony of Arthur Hanisch.)

Mr. Mackay: I would like, if the Court please, for the purpose of the record, I don't want to get into a long argument about the purpose of an injunction suit. I think that will show on its face what it is. Counsel outlined—I call your Honor's attention to page 5 of the suit, where they quote, Paragraph 7 of the contract quotes: "First Parties shall handle no other products than those manufactured or produced by Second Party, and shall be the sole distributors of all products manufactured or produced by Second Party except as herein otherwise provided."

I just wanted to call that to your Honor's attention. We don't agree with counsel's interpretation. [212]

Mr. Maiden: Well, if the Court please, the Court will find in the prayer of that petition the sole and only purpose of the injunction suit, and Mr. Mackay will be forced, eventually, to agree with me.

Mr. Mackay: I am sure Mr. Mackay won't agree with you.

Q. (By Mr. Maiden): Now, Mr. Hanisch, if you know, what basis did you think you had to claiming any ownership to the trade-mark, "the Stuart formula"?

A. The letter which is in evidence from our trade-mark attorney.

Q. Well, but you must have suspected something; otherwise, you wouldn't have asked for an opinion from the attorney.

A. I got it from my attorney at the time we went

(Testimony of Arthur Hanisch.)

to him to help find out what our rights were and whether that trade-mark had ever been issued.

Q. What was the name of that attorney?

A. Fred Miller of Hazard & Miller.

Q. Did you likewise have an attorney by the name of Mr. Dunlap?

A. Yes, he was our general counsel.

Q. Did Mr. Dunlap participate in the drafting of the contract of May 5, 1941?

A. He did not. [213]

Q. He did not?

A. He saw it, he read it, and made comments on it, but the contract was drafted by Vita-Food attorneys.

Q. Isn't it a fact, Mr. Hanisch, that you and Mr. Dunlap wrote the last two provisions or three provisions in the contract with respect to setting up an arbitration board in case of disputes between the parties?

A. I can't recall whether that was the case.

Q. You have no knowledge of it?

A. No. May I amplify this? There was an original contract submitted to us which was not gone over by Mr. Dunlap. However, it was gone over by two of my associates in the business, Mr. Pelletier and Mr. Pringle, and we suggested some changes, and we then got back the revised agreement, which is substantially the agreement of May 5th that we signed.

Now, it is possible then that in Mr. Dunlap's

(Testimony of Arthur Hanisch.)

office some changes might have been made the date we signed it. I am not sure on that point.

Q. I call your attention to the fact that Paragraph 22 sets up that "any dispute arising either in the interpretation or performance of this contract shall be adjusted by arbitration as follows:—" Then it sets up the procedure for the arbitration——

A. We felt—oh, excuse me. [214]

Q. Did you ever resort to this provision of the contract to settle any of your disputes, or claimed disputes, with The Vita-Food Corporation?

A. We did not, because upon advice of my counsel, he felt that that arbitration did not apply to the type of situation we were in. I don't know the legal technicalities in the matter.

Q. Who was your attorney in that respect?

A. Mr. Dunlap.

Q. You don't know whether Mr. Dunlap drafted that provision or not? A. No, I don't.

Q. But notwithstanding the fact that you say you were dissatisfied all during the existence of this contract and wanted the contract cancelled that you were put in a hoaxed position, I believe you stated, you never did undertake to submit those difficulties to the arbitration procedure?

A. Never to arbitration. I did, however, take it up with Vita-Food officials.

Q. Now, Mr. Hanisch, if you know, what statement of facts did you give the attorneys as a basis for their giving you an opinion as to whether or not

(Testimony of Arthur Haniseh.)

Vita-Food Corporation had proper title to the trade-mark?

A. It is difficult for me to recall what those conversations with the attorney were. I believe the attorney asked me [215] when The Vita-Food Corporation applied for the trade-mark and—do you want me to recall the conversation if I can?

Q. I want you to give just as full an explanation of the facts——

A. Mr. Lewis came to me and I can't recall the date, but I think it was in the summer of 1941, stating that they had made application for trade-mark under the 1905 Act, that it had been refused because of technicalities. I don't know whether it was the use of proper names, but it was that type of technicality. He, therefore, asked me whether we wanted that thing changed. Trade-marks meant so little to me, and I said, "Don't do anything about it."

He said, "You would have a weaker trade-mark under the 1920 registration."

That was one thing I told the attorney, as I recall it.

The next thing I told him was that we had notice from Mr. Lewis that the trade-mark had been issued. That was in September of 1942. That is all of my knowledge of anything that was actually done, as I recall it, on the trade-mark up to that time.

Q. And that is all of the facts that you supplied this firm of attorneys? A. That is right.

Q. From which to reach an opinion? [216]

(Testimony of Arthur Hanisch.)

A. That is right. However, we did—I don't know whether you want me to go into this—we did very thoroughly go into the whole contract with the trade-mark attorney, because we were asking him a question about a part of the contract, and he wanted to see it all.

Q. What effort did you make to determine what the true facts were with respect to Vita-Food's application for registration of the trade-mark?

A. I made no effort whatever. I was told that they had applied.

Q. You were told that they had applied. Now, Mr. Hanisch, did I gather from your examination in chief that you represented to this Court that the Vita-Food Corporation had made some misrepresentation of facts in obtaining its registration of the trade-mark?

A. I would not say that the corporation had, because there was no misrepresentation made under the Vita-Food title.

The things that made me go into this contract, however, were representations on the part of two individuals which led up to this contract.

Q. Now, I want to know what those representations were. We have been beating around the bush here. Now, let's get down and clarify the misrepresentation which you are claiming about—— [217]

Mr. Mackay: With respect to what?

Mr. Maiden: With respect to the thing——

The Court: You don't know. We haven't heard. You don't know what those misrepresentations were.

(Testimony of Arthur Hanisch.)

The Witness: Shall I answer that question?

Q. (By Mr. Maiden): Yes.

A. The representations were as follows: One, and a very primary one, I was led to believe that this product had been developed in the laboratories at California Institute of Technology.

Q. Who made that representation to you?

A. Mr. Lewis.

Q. All right.

A. I was told that this product that was being offered to me was a natural product, similar in every respect to a product known as Galen B, which was selling at \$4.75. I was also told that they had a new, unique, exclusive and unusual method of stabilizing vitamins A, B, together with members of the B complex. I was told that they were financially dependable in every respect, that they could back up any return of merchandise, any return on a food and drug seizure. I was told that they had facilities for making tablets. I later found out that those tablets were farmed out.

They, under the contract, had the right to farm out, [218] but I was told that they had that equipment. I was told they had a very modern, up-to-date plant, with every type of scientific control, which I later found out was not the case. Those are the essential points. Excuse me—one more. I was told they had this product perfected so there was no danger we would have any trouble; that it would be uniform, stable; that it would hold up in every respect. I was also told that they had sufficient experi-

(Testimony of Arthur Hanisch.)

ence. Mr. Lewis was represented by Dr. Borsook to me as being an expert in this subject, and I took it as a statement of complete facts, which I found out was not the case later, because of the faulty products we received.

Q. Now then, all those representations were made to you by Dr. Borsook?

A. Dr. Borsook and Mr. Lewis. Now, there is another point there, however. I have a letter in which I asked on some of these points, a letter from Mr. Lewis to Mr. Charles King. Mr. King, before I got into active negotiations with Mr. Lewis and Dr. Borsook, acted as an intermediary and some of those points were cleared up with him, as an intermediary. Most of those points I have given you were a direct result of conversations with Mr. Lewis and Dr. Borsook. There is one more point to make my answer complete. May I give one more point?

Q. Oh, yes. [219]

A. There is one more point which I did not recall, but which had a very great bearing on later performance in this contract. I was told that the Galen B Company or the Galen B——

Q. When you say you were told, who told you?

A. In these conversations with Mr. Lewis and Dr. Borsook. I was told that the Galen B Company at that time was selling in Southern California 60,000 bottles of this product per month, which I later found out not to be true.

Now, the importance of that, in my mind, from

(Testimony of Arthur Hanisch.)

the standpoint of misrepresentation was one reason for the high quotas established.

Q. Now, I believe you stated already and made it very clear in the record that you never at any time regarded this trade-mark, "the Stuart formula," as being of any significance or value.

A. That is completely true, because at the time we got into this discussion I wanted and Mr. Pelletier, one of our officers, wanted me to throw the trade-mark out the window, operate as The Stuart Company and call the vitamins Stuart's Vitamins, but I had no freedom under this contract to do it, because I was forced to buy from The Vita-Food Corporation. I could not buy from anybody else. I could have operated without the trade-mark if I could have gotten out from under the contract, but I could not operate with the trade-mark under [220] this contract.

Q. Now, I am going to show you—first, I want to ask you: Is it your understanding that neither you nor any of your associates in The Stuart Company were interested in this trade-name, "the Stuart formula," as having any significance or any value?

A. Well, it had significance in that it was a way of identifying that particular product of The Stuart Company, in the minds of the doctors.

Q. Isn't that something of value; didn't you consider that something of value?

A. As I explained yesterday, it would have cost us a matter of six or seven thousand dollars to no-

(Testimony of Arthur Hanisch.)

tify the doctors that we were changing the title of that particular product.

Q. In other words, you would have been willing to have paid six or seven thousand dollars for the title to that trade-mark at any time?

A. I would have paid the equivalent of what it would cost me to change the name.

Q. And you say it would cost how much?

A. My estimate at that time was six or seven thousand dollars.

Q. Now, I show you here a letter dated December 9, 1941, and this letter is addressed to Vita-Food Corporation, signed Ludwig Lauerhass. Will you identify Mr. Lauerhass' [221] signature, and tell us who he is.

A. Ludwig Lauerhass is a man who works in our office and handles the affairs for me when I am not here. He is kind of an assistant to me.

Q. Was he an official of The Stuart Company at that time?

A. I don't believe so. He is not a stockholder.

Mr. Maiden: I would like to offer this letter of December 9, 1941, in evidence as Respondent's Exhibit G.

The Court: What is it about?

Mr. Mackay: No objection.

Mr. Maiden: This letter is addressed to Vita-Food Corporation, Attention of Mr. Lewis, and reads as follows:

(Testimony of Arthur Hanisch.)

“Gentlemen:

“You inform us that knowledge has come to you that the Rite Laboratories have prepared labels having a B complex syrup so closely resembling the Stuart formula label that confusion is certain to be created in the public mind.

“In accordance with our contract with you, it is understood that you are proceeding to protect the Stuart formula label and it is agreeable that you instruct your attorneys to act in our name as well as in your own, if this is considered desirable to effect proper protection.” [222]

The Court: Any objection? Without objection, the document is received as Exhibit G.

(The document above referred to was received in evidence and marked Respondent's Exhibit G.)

Mr. Maiden: If the Court please, it appears from the contract of May 5, 1941, that under that contract the Vita-Food Corporation was required to obtain a registration in its name of the trade name, “the Stuart formula.”

Q. (By Mr. Maiden): Now, Mr. Hanisch, I believe you testified that you attended the final conference that resulted in this agreement of November 28, 1942.

A. That is partially correct. I wasn't there—the conferences started between the two attorneys, as I recall it, about 6:00 o'clock. However, I did

(Testimony of Arthur Hanisch.)

not arrive at the conference until approximately 12:30 in the morning.

Q. Approximately 12:30 in the morning?

A. That is right.

Q. What time did that conference break up, with the agreement executed, if you recall?

A. It was very late. I can't give you the exact time. I would say roughly around 5:30 or 6:00 in the morning.

Q. Mr. Wiseman was representing The Vita-Food Corporation? A. That is correct. [223]

Q. Do you recall whether or not Mr. Wiseman had telephone conversations with Mr. Lewis during the course of those negotiations?

A. Not that I can recall. He did leave the room once or twice. Now, whether it was to look up some books or some other material, I don't know. I left the room once or twice also, and I don't recall an actual telephone conversation.

Mr. Maiden: I believe that is all, if the Court please.

The Court: Five minutes' recess.

(Short recess taken.)

The Court: Proceed.

Mr. Maiden: I should like to offer this as Respondent's exhibit next in order. This is a copy of the temporary restraining order, an order to show cause, emanating from the Superior Court of the State of California, in and for the County of Los Angeles. This was in connection with the in-

(Testimony of Arthur Hanisch.)

junction suit which was brought by Vita-Food Corporation and which is in evidence at the present time.

The Court: Without objection, it is received as Exhibit H.

(The document above referred to was received in evidence and marked Respondent's Exhibit H.)

The Court: Mr. Mackay, did The Stuart Company file a cross-complaint against The Vita-Food Corporation? [224]

Mr. Mackay: No, your Honor, they did not file one. They prepared one which we are going to put in evidence by another witness.

Redirect Examination

By Mr. Mackay:

Q. You were asked by counsel to enumerate the representations that were made to you initially to induce you to enter into this contract of May 5, 1941? A. Yes.

Q. Among those, as I understood, you referred to the representations made with respect to the fact that the product had been perfected in the California Institute of Technology? A. Yes.

Q. Also with respect to the financial responsibility of the company? A. Yes.

Q. Were there any other representations made at this particular time, as you recall?

(Testimony of Arthur Hanisch.)

A. There were two representations, which were important and which I did not completely recall in cross-examination. One very primary one—that the whole basis of our arrangement was to be a semi-humanitarian type of thing; that the profits were to be reasonable ones; that the Vita-Food Corporation would keep its profits very low and have us in a position where they could supply the vitamins for us more [225] economically than anyone else could. That was one representation.

The other one was—I don't believe I emphasized it enough on cross-examination—was that they claimed to have a new and exclusive process for doing this thing.

Q. Was that a secret process?

A. It was a secret process, yes.

Q. Now, did you later find out that any of those representations, or all of them, were not so?

A. Yes.

Q. When did you find that out?

A. With reference to which specific one?

Q. With reference to the quality, with respect to the representation in connection with the production or the perfection of the product, in the laboratories of the California Institute of Technology.

A. October of 1942.

Q. What have you to say with respect to the representation with respect to the financial ability?

A. First, in the summer of 1941, and then there was a recurrence of it about December of 1941, and again about May of 1942.

(Testimony of Arthur Hanisch.)

Q. I think you have already, in your testimony, testified with respect to when you found the product not to be what it was represented. I will not go over that now. [226]

When did you find the representation with respect to the secret process was not true?

A. In October, 1942.

Mr. Mackay: Now, if your Honor please, yesterday there was an exhibit marked for identification. I think it was 13, an opinion by Mr. Miller. May I have that at this time?

If your Honor please, counsel, in his cross-examination of this witness referred several times to the opinion given by Mr. Miller, the present attorney. I should like again, at this time, to renew my offer of this document in evidence for the purpose I expressed yesterday.

Mr. Maiden: If the Court please, I object upon the same grounds that I objected to yesterday: namely, that I am entitled to be face to face——

The Court: Why don't you subpoena the attorney who rendered that opinion? I will sign a subpoena.

Mr. Mackay: Of course, I was slipping it in for that limited purpose, showing that an opinion was given influencing these people in the Court of action. That is the only purpose; it is not to show the opinion is absolutely the law. We believe that he is a reliable attorney, but this does——

The Court: The difficulty in the issue is, as I see it, there was no cross-suit filed by The Stuart Com-

(Testimony of Arthur Hanisch.)

pany against the Vita-Food Company, but apparently there was some [227] ambiguity in the contract of May 5, 1941, as to what the rights and duties of The Stuart Company were; rights and duties upon a partial termination of the contract and also what conditions would provide the basis for one party to consider that the contract was subject to termination in its entirety.

Now, of course, there will be evidence that is not going to be produced, but the record does show that eventually an agreement of settlement was worked out, and that an agreement of settlement has been introduced in evidence. That is Exhibit 12 and that is the agreement of November 28, 1942.

Under that agreement, the Vita-Food Company agreed to dismiss with prejudice the suit, which was instituted in the Superior Court, and they agreed that the May 5, 1941, agreement was terminated and cancelled, as though it had never been executed, and the parties gave each other various quit-claims and releases.

Now, also the Vita-Food Company quit-claimed its interest in the The Stuart Formula, the trade-mark; that is, the trade name, trade-mark to The Stuart Formula, which Vita-Food Company had registered and which, under the other contract, they had title to. Then the agreement of November 28, 1942, sets forth in separate clauses what The Stuart Company would pay to the Vita-Food Company, and it is not stated just for what purposes or for what things these payments are made, and that

(Testimony of Arthur Hanisch.)

when we get over to the tax case, that is the problem that [228] is given to the Tax Court. The Tax Court is to construe the agreement of November 28, 1942, and it is to determine for what these payments were made.

Now, since that is a very difficult problem for the Tax Court, the Tax Court should have as much aid as possible from the parties themselves, and the government is contending, in this case, that all or part of these payments were for the purchase of the trade name. Now, it is conceivable that none of the payments were in consideration of obtaining title to the trade name; it is also conceivable that some part of the payments were consideration for obtaining title to the trade name. Since that is our problem and the opinion of Hazard & Miller, which was marked for identification as Exhibit 13, comes so close to the critical question, then, I feel that the Respondent's objection should be sustained and if either party wishes to lay a foundation, complete foundation, for the receipt in evidence of Exhibit 13 for identification by calling in a witness or by doing anything else, they still have the opportunity to do that.

So, at this time I will still sustain the objection to the receipt in evidence of Exhibit 13, even though I understand that petitioner is offering it for a limited purpose. Nevertheless, if it is in the record it provides the basis for argument and I think that perhaps in the end that exhibit can be received, but at this time I still do not think it should be, [229]

(Testimony of Arthur Hanisch.)

without the laying of more of a foundation for the exhibit.

Now, you wanted to go ahead with your cross-examination?

Mr. Mackay: Yes.

Q. (By Mr. Mackay): Now, Mr. Hanisch, I think one of the other representations you said that were made at the time to induce you to enter that contract was related to the quantity of sales of Galen B? A. Yes.

Q. Did you subsequently find out that that representation was not correct? A. Yes.

Q. When did you so find out?

A. In September or August; August or September of 1942.

Q. Did you subsequently find out that the representation with respect to the secret process was not true? A. Yes.

Q. When? A. October, 1942.

Q. Now, Mr. Hanisch, I call your attention to Exhibit 15 and particularly to the letter which is attached there, of October 8, 1942, to The Stuart Company, Shaler Food Products Company, Arthur Hanisch, Pasadena, California, which is from the Vita-Food Corporation. [230]

Now, near the close of the session last night you were asked by the Court, as I recall, a question as to what your situation would be if the contract were terminated, and, as I recall, you stated to the Court that there would still be some obligations upon you.

(Testimony of Arthur Hanisch.)

Now, I would ask you if you have an explanation of that statement?

A. Yes, I have an explanation. Shall I give it?

Q. Yes, please.

A. I assumed that the cancellation referred to was a specific cancellation of October 8th instead of the general principle of cancellation. As a matter of fact, when counsel asked me about it I was prepared to read—I have the letter in my hand to read—the answer to that specific letter of cancellation.

Q. I will ask you if that letter of October 8, 1942, is the only notice that you received from the Vita-Food Corporation relating to the termination of contract on their part? A. Yes.

Q. Now, I call your attention to this same exhibit, which has attached to it a printed application of the Vita-Food Corporation, United States Patent Office, and I will call your attention particularly to the following language: "The Vita-Food Corporation, a corporation duly organized under the laws of the State of California and located at Los Angeles, California, and doing business at 356 South Spring Street, [231] Los Angeles, California, has adopted and used the trade-mark shown in the accompanying drawing for a vitamin concentrate in Class 6, chemicals, medicines and pharmaceutical preparations and presents therewith five specimens showing the trade-mark as actually used by Applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the Act of March 19, 1920."

(Testimony of Arthur Hanisch.)

Now, I will ask you, if, to your knowledge, the Vita-Food Corporation had ever used the trademark, The Stuart Formula, at the time that application was made? A. No.

Q. I read again——

The Court: Would you think, Mr. Mackay, that might be a debatable point?

Mr. Mackay: Well, it may be, your Honor, but it is——

The Court: I mean, would you think also that Mr. Hanisch's answer might represent a conclusion rather than a statement of fact?

Mr. Maiden: It does, your Honor, and I object to it upon that ground, and ask it be stricken from the record.

Mr. Mackay: I should like to be heard on that. If we consider that in the light of the evidence here—we have a contract here of May 5, 1941, which specifically provides that The Stuart Company shall buy these products from the Vita-Food Corporation and that they shall be sold under [232] the name of The Stuart Formula. The evidence further shows that The Stuart Company had exclusive use of the right to sell those products under that name.

The Court: No, the contract provided that The Stuart Company had exclusive right to sell the product.

Mr. Mackay: Under that name.

The Court: No, just had the exclusive right to sell the product and then the contract provided that the Vita-Food Company was to have all right, title

(Testimony of Arthur Hanisch.)

and interest in any trade name under which the product was sold.

Mr. Mackay: I appreciate that——

The Court: So, when you asked the witness the question, whether Vita-Food ever used the trade name, The Stuart Formula, and the witness said no, of course, his answer is one that can be interpreted to mean that the Vita-Food Company did not use the trade name, in connection with the products that were sold by The Stuart Company under that contract, but the product was the product of the Vita-Food Company. It had the ownership of any trade name that was used and it had to go with the product, so it all depends on what you mean.

Mr. Maiden: I would like to make this statement——

The Court: Perhaps the Vita-Food people would claim that they had used the trade name, The Stuart Formula, because they had sold their product to a concern with the [233] understanding that it would be marketed under some name, and that it would own the name. That is why I ask you if the answer to the question doesn't involve some conclusions.

Mr. Mackay: I can see the difficulty there, your Honor, but I think I should have read the entire—the next to the last sentence here, which is more direct. [234]

It says, "This trade-mark has been continuously used and applied to said goods in applicant's business since April 5, 1941. The trade-mark is applied

(Testimony of Arthur Hanisch.)

or affixed to the goods or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown. That the mark has been in bona fide use for not less than one year in interstate commerce by the applicant.”

. Now, I want to refer, your Honor, to Exhibit 8, the contract of May 5, 1941. The sixth paragraph says “first parties shall have the exclusive right to sell said Vitaplex and Stuart Formula until November 1, 1941. Such right shall continue thereafter until and unless terminated by written notice from second party, provided, however, that such termination shall not become effective until and unless during any 60-day period between said November 1, 1941, and May 1, 1942,—” So, by the very terms of the contract the Vita-Food Corporation could not, if they lived up to the contract, sell in interstate commerce, did not sell it in interstate commerce. All I want to prove by this witness is that they didn’t.

Mr. Maiden: They did sell it, if your Honor please; they sold concentrates, bottled and labelled with “the Stuart formula,” to The Stuart Company, and The Stuart Company sold then to the general public.

The Court: Yes. It is a matter of argument whether they were justified in making that statement in their application, [235] because they are the manufacturer and the manufacturer is often said to sell goods through a distributor. So, if you want to ask Mr. Hanisch what his opinion is as

(Testimony of Arthur Hanisch.)

to whether that is correct or not, or ask him some other questions, that is perfectly all right. It takes more time, but at least in this situation we have got to take the time.

Mr. Mackay: Maybe we can clear it this way, Mr. Counsellor. Will you admit for the record that The Vita-Food Corporation never sold any of the products under the trade name "the Stuart formula" except to The Stuart Company prior to the cancellation agreement of November 28, 1941?

Mr. Maiden: I will be delighted to if I can ascertain that to be a fact, which I do not know at this time, and after I have an opportunity to confer with Mr. Lewis of The Vita-Food Corporation.

Mr. Mackay: It is a question of fact, as to whether they did. It is a question of fact as to whether it was so. It may be a question as to whether or not the mere sale of this product to The Stuart Company in legal effect was a sale in interstate commerce.

Now, we take the position it isn't because they sold it locally to us, and we became the absolute owner and sold under our name also, The Stuart Company name, never under Vita-Food, yet in this application they sold—we have sold this under our name, bona fide in interstate commerce, and [236] having been doing it for more than a year—so it is a question of fact to determine who sold what.

The Court: Well, under the sales agreement to The Stuart Company and Mr. Hanisch, you were to

(Testimony of Arthur Hanisch.)

own the trade name under which these products were resold to the public.

Now, where does that bring you? It brings you to a nice deadlock, doesn't it? It doesn't bring you out anywhere.

Paragraph 10 of the agreement of May 5, 1941, reads as follows: "Any and all trade-marks or labels under which the concentrates hereinbefore specifically described or any other products manufactured by Second Party which may hereafter be marketed or distributed or offered for sale by First Parties or either thereof, shall at all times be and remain the sole and exclusive property of Second Party," and that is just part of that paragraph.

Now, they knew that the trade name, "the Stuart formula," was going to be used, and Vita-Food knew that and so did Mr. Hanisch and his company, because according to his testimony representatives of both parties conferred with an advertising agent and they discussed the same and Mr. Hanisch has testified that he provided the Stuart part of the name. He suggested that the rest ought to be a word that would be simple and easily understood by the public, and the Vita-Food people suggested the word "formula" and so they got together. Wasn't that your testimony, or was it the testimony of the advertising [237] agent?

The Witness: No; Mr. Wiesman of the advertising agency.

The Court: So the advertising agency suggested the word "formula." Mr. Hanish said he didn't

(Testimony of Arthur Hanisch.)

want to use a word like hexylresorcinol. So the advertising agent suggested that he use a simple word called "formula," and that was the way this trade name was born and both parties knew about it.

Now, Mr. Mackay, I suggest that you ask Mr. Hanisch some factual questions if you want to, and if you want to ask him whether to his knowledge the Vita-Food people ever sold any of their products themselves under the name "Stuart formula" while the contract was in existence, you might ask him that.

Q. (By Mr. Mackay): Mr. Hanisch, can you tell the Court whether to your knowledge there were any sales made of this product under "the Stuart formula" between March—say, 1941 and November 28, 1942, except the sales that were made by The Vita-Food Corporation to you, and the sales that were made by you to the trade?

A. To the best of my knowledge, no, because had I been aware of any such sales I would have immediately filed protest because it would have been a violation of our exclusive [238] right to sell the product under that name in our contract.

Mr. Mackay: That is all.

Mr. Maiden: I have some recross.

The Court: You go ahead. Mr. Mackay is finished. You may go ahead.

(Testimony of Arthur Hanisch.)

Recross-Examination

By Mr. Maiden:

Q. Mr. Hanisch, after the agreement of November 28, 1942, was entered into, under which agreement you obtained a quit-claim from Vita-Food of the trade name "the Stuart formula," did The Stuart Company continue to use that trade name in its business?

A. The trade name "the Stuart formula" in the business?

Q. Yes. A. It did.

Q. Has it used it continuously since that time?

A. Yes. Not on all our products, but on one product or, I might better say two products, but we have other trade names. What I am trying to imply or give you is that it isn't the only name we use.

Q. What other trade names do you use?

A. At the time this agreement was signed we had another trade name, "The Stuart calcium-pantothenat." We also had the "Stuart Vitamin C." We have the "Stuart Hematinic." We have the "Stuart B Complex with C"; we have the [239] "Stuart Therapeutic Multivitamin." This is just one of our items, you see.

The Court: You mean at the present time?

The Witness: At the present time. The only one we had at that time, as I recall it, was the "Stuart calcium-pantothenate"; at the time of the settlement agreement of November, 1942.

(Testimony of Arthur Hanisch.)

The Court: At the time of the settlement agreement?

The Witness: That is right.

The Court: You received a notice of some kind of termination from Vita-Food in October of 1942, and did you after October 9, 1942, then develop another trade name or did you develop that trade name before they gave you notice of cancellation?

The Witness: Are you referring, your Honor, to the calcium-pantothenate trade name?

The Court: Yes.

The Witness: I will have to go into a little explanation on that, if you will pardon it. Mr. Lewis came to me and at that time there was a great deal of publicity on the value of calcium-pantothenate for gray hair and Mr. Lewis asked me to write in on the title of that popularity and market that product. When the matter came up we considered the trade name unimportant. We simply called it what was in the product, "Stuart calcium-pantothenate." There was no [240] trade-mark asked for, no trade-mark considered. We simply put it out as "Stuart calcium-pantothenate."

The Court: Then you did sell it; you say Mr. Lewis was with Vita-Food?

The Witness: That is right. Mr. Lewis was with Vita-Food.

The Court: And you were selling some of those products? Did you purchase that from Vita-Food?

The Witness: Yes.

The Court: That came under the heading of "other"?

(Testimony of Arthur Hanisch.)

The Witness: Other products.

The Court: Under your contract, but that was the only other product you were selling besides the concentrates?

The Witness: Up to the cancellation.

The Court: Well then, after the cancellation, then, you began selling other products, that you purchased from other manufacturers?

The Witness: That is correct.

The Court: When you did that, then, you applied your own name to those products, is that correct?

The Witness: That is correct.

The Court: Then you developed those names as you took over the product?

The Witness: That is correct.

The Court: Did you register those names yourself [241] as trade-marks?

The Witness: Yes, those names are registered.

The Court: I see.

Q. (By Mr. Maiden): I am just wondering why it is that you went to the trouble of having those trade names registered, if you didn't think they were much of a trade-mark?

A. No, but I think it is the customary thing for anyone to do, to register a trade-mark name. There was no value to them when I registered. As a matter of fact, to most of them now there is no value. They haven't shown any profit.

Q. Now, I am going to show you a letter dated February 14, 1945, and ask you if you will identify

(Testimony of Arthur Hanisch.)

this letter as going to Vita-Food Corporation from The Stuart Company.

A. That is correct, and I identify Mr. Dunlap's signature.

Q. Has this same type of letterhead been used ever since the November 28th agreement?

A. I couldn't tell you that. There have been changes and whether that has been in continuous use, I wouldn't know.

Mr. Maiden: If the Court please, I would like to offer this in evidence as Respondent's next exhibit.

The Court: Received as Exhibit I.

(The document above referred to was received in evidence and marked Respondent's Exhibit I.) [242]

Mr. Maiden: In addition to the contents of Respondent's Exhibit I, I would like to call the Court's attention to this letterhead and to the display on the letterhead of the little mark with "the Stuart formula."

Q. (By Mr. Maiden): Mr. Hanisch, calling your attention to the little blue block——

A. That is a bug. I think it is a technical term.

Q. On which appears "the Stuart formula." Is that the same bug and color and so forth that was used under the contract of May 5, 1941?

A. Are you asking, was that bug on the letterhead at that time?

Q. Well, I mean, is that the type of bug you

(Testimony of Arthur Hanisch.)

used upon your boxes and your bottles in selling the product?

A. Well, I don't see how you can compare them, because you have an entirely different situation. It certainly isn't like the label.

Mr. Mackay: If your Honor please, I don't like to interfere with recross-examination, but it seems to me that is entirely improper. None of those things were gone into on redirect examination. We have another witness here who is anxious to get away tonight, and I think it is improper recross-examination.

The Court: Well, the objection is [243] overruled.

Mr. Maiden: All I am interested in, if the Court please——

The Court: All right. Let's——

Mr. Mackay: If you will show me what you want, I would be glad to look at it and save a lot of time.

The Court: I think you asked the witness if he used that stamp on his letterhead at some previous time.

Q. (By Mr. Maiden): Did you?

A. At the date of the cancellation?

Q. Prior to the date of cancellation.

A. I can't recall when we started it. We have eliminated it now and we have made changes, but I don't know whether we were at that time——

Q. Mr. Hanisch, I call your attention to a letter dated August 25, 1942, addressed to Mr. Max Lewis,

(Testimony of Arthur Hanisch.)

care of The Stuart Company. Is that the Mr. Max Lewis of Vita-Food Company?

A. I wouldn't know. I imagine it was. This signature of Edith K. Hales—she was an employee of ours in the Chicago office at that time. I would not know the signature. I can't identify that.

Q. Can you identify this as being your type of letterhead, used by The Stuart Company, prior to the agreement of November 28, 1942? [244]

A. I assume that it must have been, because it is dated August, 1942.

Mr. Maiden: I would like to offer this in evidence, if the Court please.

Mr. Mackay: Let's see it. No objection.

The Court: Received in evidence as Exhibit J.

(The document above referred to was received in evidence and marked Respondent's Exhibit J.)

Q. (By Mr. Maiden): One other thing, Mr. Hanisch, and believe it or not I am going to quit. You spoke about certain information that you wanted to learn about the Vita-Food Corporation, before you entered into this agreement of May 5, 1941, and I believe that you stated that you undertook to elicit this information through a Mr. King?

A. That is right.

Q. Will you look this over and see if you can identify Mr. King's initials on that?

A. Yes. As a matter of fact, I have a copy of this in my files which I think Mr. Mackay is going

(Testimony of Arthur Hanisch.)

to use later on. That is, as far as I know, the letter from Charles King.

Mr. Maiden: If the Court please, I would like to offer this in evidence at this time as Respondent's next exhibit.

Mr. Mackay: No objection. [245]

The Witness: I wouldn't be able to say that that definitely is his signature, but it looks like it, as I recall. I don't know his signature well enough.

The Clerk: Respondent's Exhibit K.

The Court: Received as Exhibit K.

(The document above referred to was received in evidence and marked Respondent's Exhibit K.)

Q. (By Mr. Maiden): Now, I don't want to impose on you too much, but I have here a letter dated—that is a copy of a letter—purported letter, dated January 20, 1941, addressed to Mr. Charley King, 108 South Raymond Avenue, Pasadena, California, and that appears to be from M. H. Lewis, Treasurer of the Vita-Food Corporation.

Mr. Mackay: I have the original here and I would be very glad to introduce it in evidence. I was waiting for another witness, who was going to identify it. I would appreciate it very much if we could get another witness who is going to leave tonight. I will assure you I will put that in.

Mr. Maiden: I am awfully forgetful. I might forget it. I think that has a place in the case at this time.

(Testimony of Arthur Hanisch.)

The Court: Subject to your comparing the copy with the original—Mr. Mackay can check the copy against the original.

Mr. Maiden: Very well, your Honor. Subject to [246] verification with the original letter, the Respondent now offers in evidence a copy of a letter dated January 20, 1941, to Mr. Charles King, from M. H. Lewis of the Vita-Food Corporation.

Mr. Mackay: There is no objection to that letter.

The Court: Received as Exhibit L.

(The document above referred to was received in evidence and marked Respondent's Exhibit L.)

Mr. Maiden: I believe that is all.

Mr. Mackay: That is all.

The Court: I have one question that I think should be asked you rather than anyone else. We have in evidence Exhibit 12. It is a settlement agreement, and it calls for payments in Clauses 3 and 4. I wanted to ask you if you will look at Exhibit 12 and tell me what was the total amount you paid; what was the total amount that you personally paid?

The Witness: You mean me personally, or the corporation?

The Court: What was the total amount that was to be paid under that agreement to Vita-Food Corporation?

The Witness: \$197,000.00, part of which was contingent——

(Testimony of Arthur Hanisch.)

The Court: Is that the full amount?

The Witness: Just a moment. It is \$197,700.00.

The Court: That is the total amount; that is made up [247] of two amounts, is it not?

The Witness: It is split into three distinct parts.

The Court: Will you read the three parts?

The Witness: "\$35,000.00 upon the execution of this agreement, receipt of which is hereby acknowledged by First Party, and \$40,000.00 payable at the rate of \$4,000.00 per month, as per note executed concurrently herewith, which note shall be an obligation independent of but not in addition to the above amount."

Shall I just give you the other amount, or perhaps I had better read it all. "Second Party agrees to pay to the First Party on a royalty basis and as additional consideration for the execution of this agreement the sum of \$122,700.00 which sum is additional to the above-mentioned \$75,000.00.

The Court: Now, over what period of time—you paid \$35,000.00 upon the execution of this agreement; \$40,000.00 to be paid over a period of 10 months——

The Witness: That is right.

The Court: And \$122,700.00 to be paid on a royalty basis.

The Witness: Shall be paid at the rate of 7½ cents per unit of vitamin concentrates as sold and marketed by Second Party, beginning October 1, 1943, and continuing until the said sum of \$122,700.00 is fully paid.

(Testimony of Arthur Hanisch.)

The Court: Now, has that sum been fully [248] paid?

The Witness: Yes.

The Court: When was it fully paid?

The Witness: I would have to have—I would have to hazard a guess on that.

Mr. Mackay: There is an exhibit, Exhibit 5 that shows when it was paid.

The Court: Oh, that is the exhibit I was confused about yesterday.

The Witness: There is a listing of those payments.

The Court: Exhibit 5. Perhaps you can explain this to me?

The Witness: I hope I can.

The Court: What would you say was the time when your final payment was made, the last payment was made; 1945 or 1944?

The Witness: I would assume from this that it is April, 1945. Yes, April, 1945.

The Court: The taxable year in this case is what?

Mr. Mackay: 1943, 1944 and 1945; March 31st.

The Court: Does the issue in this case take us up to the end of payments involved?

Mr. Mackay: Yes. Eighteen thousand and some odd dollars into '46.

The Court: All right. Now, what did you mean in your settlement agreement in Clause 4 when you said, "Second [249] Party agrees to pay to First Party on a royalty basis and as additional consid-

(Testimony of Arthur Hanisch.)

eration for the execution of this agreement the sum of \$122,700.00, which sum is additional to the above-mentioned \$75,000.00. The said \$122,700.00 shall be paid at the rate of 7½ cents per unit of vitamin concentrates as sold and marketed by Second Party beginning October 1, 1943, and continuing until the said sum of \$122,700.00 is paid. A unit of vitamin concentrates is hereby defined and agreed to be the equivalent of one pint or 96 tablets of the product now being sold and marketed under the trade-mark 'the Stuart formula' at the potencies now in effect in the Stuart formula liquid. Such payments shall be paid on the equivalent of the said unit of vitamin concentrates whether the same shall hereafter be sold and marketed in liquid, tablet, or in any other physical form or whatever the size of the package or packages by Second Party, whether sold under the trade-mark 'the Stuart formula' or not''?

Now, what does all of that mean?

The Witness: We wanted to set up a measure. In other words——

The Court: I guess I will have to ask you something more direct than that. That agreement was executed on November 28, 1942. Now, on November 28, 1942, were you selling any vitamins that were manufactured by anyone other than the Vita-Food Company? [250]

The Witness: No.

The Court: Then, did you intend selling any vitamin products after November 28, 1942, which

(Testimony of Arthur Hanisch.)

would be manufactured by some concern other than the Vita-Food Corporation?

The Witness: Yes, after the cancellation.

The Court: What date is the cancellation regarded as having actually taken place or being effective?

The Witness: I believe November 28, 1942.

The Court: That was the understanding of the parties?

The Witness: Yes.

The Court: If you were to pay $7\frac{1}{2}$ cents per unit of vitamin concentrates, that would mean you were going to pay them $7\frac{1}{2}$ cents per unit of vitamin concentrates, which you would sell after November 28, 1942, which you might purchase from some other concern, isn't that right?

The Witness: That is correct.

The Court: Why did they want you, and why did you agree to pay them $7\frac{1}{2}$ cents for any vitamins made by anyone else that you might sell?

The Witness: It was a method of measuring the payments. We agreed to a settlement. They wanted part in cash and I agreed to pay part on a contingency basis; that is, if and when we sold vitamins.

The Court: What would a sale of a unit of [251] vitamin concentrates mean?

The Witness: A unit, as it is defined there, has a retail price of \$2.30. It is a pint of liquid or 96 tablets.

The Court: The unit is supposed to be 96 tablets?

(Testimony of Arthur Hanisch.)

The Witness: Yes. It was purely a measuring stick.

The Court: Any other questions?

Mr. Maiden: I have one further question, if the Court please.

Q. (By Mr. Maiden): Mr. Hanisch, was the summons in respect to the injunction suit which is in evidence, I believe as Petitioner's Exhibit 15, and the restraining order issued by the court, pursuant to the prayer of that injunction petition served on you or The Stuart Company prior to November 28, 1942?

A. The summons was served before that; the Thursday before, I think. I don't know.

Q. Then, the restraining order was likewise served prior to that date?

A. I don't know about that. I don't recall and I had forgotten there was such a thing, but I do know the summons were served on me at my house.

Q. You do know there was a restraining order served on you, or The Stuart Company?

A. I have forgotten about it. I hadn't thought about it since then, and it had completely slipped my memory. [252]

Q. Let's see if we can refresh your memory. Will you look that over and see if you recall receiving a copy of that temporary restraining order?

A. Would it indicate here it was served on me at my office or my home? That might help refresh it.

Q. I don't believe it does show. I simply wanted

(Testimony of Arthur Hanisch.)

to know whether or not you have any knowledge of this having been actually served upon you.

A. I cannot definitely say that I have that knowledge.

Mr. Mackay: May I ask, counsel, have you examined the record of the County Clerk to see whether or not such a notice was served? If you have——

Mr. Maiden: I have not checked it yet, but I intend to prove the date of service, if necessary, but I will check and give you my statement on it and then we can stipulate.

Mr. Mackay: We will take care of that later on.

Q. (By Mr. Maiden): This one last question and I am through. I believe you stated that you placed orders with the W. T. Thompson, William T. Thompson Company, in December of 1942?

A. I believe the first orders were placed in December.

Q. When did you receive the first delivery under those orders, Mr. Hanisch?

A. I am not in a position to tell you that. It takes some time to get merchandise through, but I wouldn't know the [253] exact date.

Q. I believe under this agreement of November 28, 1941, it is shown that you had outstanding with Vita-Food Corporation at that time at least two unfilled orders, Nos. 36 and 37. Do you recall that?

Mr. Mackay: Just a moment. I think you referred erroneously to the agreement of 1941.

(Testimony of Arthur Hanisch.)

Mr. Maiden: It should have been November 28, 1942.

The Witness: Yes, at that time we did have orders and we made provision for taking in those orders in this cancellation agreement.

Q. (By Mr. Maiden): As you best recall, were those two orders sufficient to take care of your business up until, say, March 31, 1943?

A. I wouldn't be in a position to say exactly, because our inventory varied and your sales varied, so I couldn't tell you that.

Mr. Maiden: That is all.

Mr. Mackay: If your Honor please, I should like to adjourn at 5:00 o'clock tonight, because I have a very important engagement that has been made for quite some time. I had another witness here, but there is only about nine minutes and I was wondering if it would be well to start with him tonight or wait until tomorrow.

The Court: If you will bear with me for [254] just a moment, I will give you an answer in a minute. I think that you could swear in the witness and just start.

Mr. Mackay: My associate, Mr. Dunlap, will call Mr. Miller.

Mr. Dunlap: I wanted your Honor to be informed that I shall be called as a witness in this case. I do not expect to argue my testimony, and if there is any rule of this Court which would prohibit my testifying subsequently, having examined this witness, I would like to inquire.

The Court: Yes, we do have that rule. Our general rule is that if an attorney is going to be a witness in the case, he should not participate in the trial.

Whereupon,

GEORGE MILLER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George Miller.

Direct Examination

By Mr. Mackay:

Q. Mr. Miller, what is your occupation?

A. Pharmacist.

Q. And how long have you been a pharmacist?

A. I have been a registered pharmacist since 1922. [255]

Q. Have you been carrying on that profession since that time?

A. Yes, and before that time.

Q. Before that time? A. Yes, sir.

Q. Whereabouts?

A. In Cleveland, Ohio; State of Michigan; Detroit in particular; Greater Detroit; City of Philadelphia; City of New York; City of Trenton and City of Chicago.

Q. What is your occupation at the present time?

A. I am president of Strong Cobb and Company, Incorporated, of Cleveland, Ohio.

(Testimony of George Miller.)

Q. Now, will you please tell us who Strong Cobb is?

A. Strong Cobb is a private formula manufacturer, in business since 1933, manufacturing products under direct or laboratory formulations, produced either by the customer or by our own laboratories for people in the industry, particularly national distributors of products, both in the proprietary field, which is the patent medicine field, and particularly in the ethical field, which is for the sale to the druggists, under the doctor's prescriptions.

Q. What do you mean by ethical, now, please?

A. The so-called ethical field pertains to items which are sold to the druggists and sale of which is caused by detail work to the physician. [256]

Q. Well, how does the Strong Cobb Company compare with other similar institutions in strength?

A. Well, Strong Cobb is very financially sound. It is the largest private formula manufacturer in the world today.

Q. What do you mean by "formula maker"?

A. We have in our laboratory functions many research technicians and chemists who can produce a given formula or a vehicle for formulas, depending upon the needs or the wants of the national distributor of preparations.

Q. When did you first hear of the vitamin products sold under the name "the Stuart formula"?

A. In, I believe it was in October, 1942.

Q. October, 1942?

A. Yes, sir.

(Testimony of George Miller.)

Q. Did you make an examination of that at that time, that product?

A. The product itself was picked up by our Mr. H. A. Strathe, vice-president in charge of sales, and sent into the home office for duplication. We made a very thorough examination of the product. In fact, we picked up several other samples at that time and found a very great variance in the product itself as to taste, layer construction and also in a peculiar blowing reaction of the product at that time.

It was a very simple matter for us, with [257] our knowledge of the vitamin field to duplicate that product, knowing the basic ingredients as stated on the label.

Q. In your examination did you determine what the base of the ingredients were?

A. The base of the ingredients which we received at that time was molasses, which is a forbidden thing in a pharmaceutical field.

Q. Why is it forbidden?

A. Because of its fermentation blowing properties, it cannot be controlled under all conditions.

Q. How long had it been known to be improper?

A. Well, I have only been in the drug business for approximately 40 years and I have known it since the first year I was in the drug business. It goes back to the old days when the mothers fed molasses to the baby with a little sprig of lemon, just for a cold.

Q. From your examination of this product, in

(Testimony of George Miller.)

your opinion, was there any secret, secrecy about the development of the product?

A. There is nothing new, novel or secret, except good pharmaceutical knowledge of the proper use of a vehicle to carry the known vitamins as expressed on the label of that product.

As you know, those vitamins need careful handling, due to the fact that they have to have specific—without [258] getting too technical—specific acidity or alkalinity to preserve their potencies. That is a matter known to the trade.

Q. Can you tell the Court what other ingredients were in that product, except molasses?

A. In the original product?

Q. Yes.

A. There was Vitamins A, D, B1, B2, Vitamin C, calcium-pantothenate. I believe there was Vitamin C in one of the vitamins we picked up. CC doesn't hold in solution. There was calcium-pantothenate, pyridixon, niacin, plus the possibility of some natural rice brand concentrate, which was hard to trace.

In other words, we did not examine that product analytically, and I am merely giving you the items that were stated on the label of the package itself.

Q. Well now, Mr. Miller, the vitamins that you found to be contained in this product, were they of unusual character?

A. No, they were all commercially available.

Q. Commercially available?

A. Commercially available. Every one of them.

(Testimony of George Miller.)

Q. What do you mean by that?

A. Vitamins A and D are extracts of fish, extracts of the soupfin shark, particularly, and other fish in varying [259] degrees of potency. Vitamin B1 originally contained natural substances and later synthesized by many of the pharmaceutical manufacturers, such as Murck, Pfeiser and Hoffman, LaRoche, and a few more of the smaller commercial manufacturers.

Vitamin B2 originally was contained in what they called Solvamin, which was an extract of corn, and the patent rights of which were held by the Commercial Solvents Corporation. The government later contended that neither the B2 nor B1 obtained from such sources could be considered as natural substances. Nalpin is another one of the vitamin commercial as Vitamin B6 contained in either yeast or liver or similar natural substances. They were produced synthetically. All these vitamins were commercially available from all the manufacturers of chemicals.

Mr. Mackay: If your Honor please, I dislike to ask the Court to adjourn at this time, but I am forced to go, because of a prior engagement. I will finish this witness in a very short time in the morning.

(Witness temporarily excused.)

The Court: We will recess until 9:30 tomorrow.

(Whereupon, at 5 o'clock p.m., an adjournment was taken until 9:30 a.m., Friday, January 30, 1948.) [260]

January 30, 1948

The Court: Proceed.

Whereupon,

GEORGE MILLER

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Mackay:

Q. Mr. Miller, last night I think we were talking about Vitamin C in liquid form. Have you anything to add to that?

A. Yes. I made a modified statement and I checked with my west coast representative. I said that I believed that Vitamin C was present in liquid form. I was mistaken in that statement. What I was thinking about was the formulation of the vitamin tablets, which do contain Vitamin C as a component part.

Q. Now, did your company manufacture and sell any vitamins during this period from 1941 to 1942?

A. Oh, yes, great quantities of vitamins.

Q. Have you an idea about how many?

A. Well, for example, we won the Army and Navy E in the government for vitamin work and other confidential work. We produced probably

(Testimony of George Miller.)

3,000,000 tablets for the Army and [262] Navy from that time on.

Q. Now, you spoke about the two methods or manners of distributing products. I think you mentioned one, the proprietary and the ethical.

A. That is right.

Q. Now, can you please explain to the Court the importance of a trade name with respect to the proprietary; that is, compared with respect to the ethical?

A. There is quite a distinct difference between what we called a so-called trade-mark and the proprietary or patent medicine field, which is sold to the consuming public, and the trade-mark which is sold to the physicians or the ethical field.

In other words, what I mean by ethical field is direct contact with the physician who, in turn, prescribes it on a written prescription to be sold at a registered drug store, and that is this: The ordinary conception of a trade-mark in the patent medicine field would include such products as Alka Seltzer, Bromo Seltzer, Salhepatica, Ipana Toothpaste, and all you have to do is to turn on a radio to hear Fred Allen or Walter Winchell selling products to the public.

Q. To the ultimate consumer?

A. To the ultimate consumer. That name, then, a trade-mark is a trade way of selling that particular product. It becomes what we call a franchise item. By franchise I mean [263] they have developed a name in the trade by merchandising and

(Testimony of George Miller.)

advertising through magazines, newspapers, radios and what not.

On the other hand, an ethical trade-mark is dependent entirely in my own experience, which is quite long along that line, in that the direct approach is made not to the lay public but to the practicing physician, and he is acquainted particularly with the type of formulation in that particular product. He is also acquainted in cases of vitamins, potencies, balance of the structure of the particular products, and he then relies practically, entirely, not on the name that is presented to him on a new item in particular, but on the honesty and integrity and the control of the manufacturer selling that product. So, you have got an entirely different value between trade names in the ethical field and trade names in the patent medicine or proprietary. The name of the manufacturer is the most important factor in the ethical field.

Q. You mean the manufacturer or supplier?

A. Oh, supplier; that is right. I beg your pardon. We call them distributors, too.

Q. Well, could you illustrate some of the leading companies who operate through the ethical way?

A. Yes. A great number of very fine companies who have a complete representation through clinical research; people like Parke Davis & Company, Sharp and Dome, Winthrop, [264] Abbott Laboratories, E. R. Squibb & Son, Stuart Company today, the Dillon Company and many other smaller com-

(Testimony of George Miller.)

panies. Even people like Lakeside Laboratories in Milwaukee, very fine people, do an outstanding job.

Q. Well now, for instance, take a company like Squibb that operates in an ethical way. Does the name of their products have particular significance, I mean, on the label as contrasted to the label which would show as a Squibb product?

A. Well, the Squibb label itself and the Squibb trade-mark of integrity is something that is outstanding. Squibb, as you know, make a great number of products. They are also making a great number of household products. The name "Squibb" stands for integrity and confidence. It is a label itself.

Q. Now, what have you to say with respect to the difficulty of changing a trade name that has been used on an ethical product?

A. It is not particularly difficult, nor is it too expensive to change a name, and with your Honor's permission, picking up the drug I mentioned yesterday, Hexylresorcinol, Sharp & Dome, who are the manufacturers and have the patents on Hexylresorcinol for a period of 17 years, being the founders of that name, have difficulty particularly when it came to the use of that drug in a mouthwash, so they changed [265] it to STT37, which is much simpler. They did that simply by contacting the sales departments. The detail men called on distributors and they sent out three or four series of letters to all the doctors in the territory in which they were promoting the item. There was no diffi-

(Testimony of George Miller.)

culty at that time. As a matter of fact, I was in the ethical drug operation at that time, and there was no change except in the listing in our want books of the new name.

Q. I think you spoke about the integrity of the supplier. I think you also spoke about research and control. Will you please explain briefly what you mean by control?

A. Control is the all important factor in a pharmaceutical industry. Adequate laboratory control starts from the crude material base in which every single item, every component part, regardless of its importance or regardless of its active ingredients, must be checked very carefully. We have found even at times labels are placed on wrong packages. For example, a rejection was made in our laboratory a short time ago of a carload of calcium carbonate. A carload of carbonate was rejected due to the fact that our laboratory found iron filings in very minute quantities in this particular car. Upon investigation we found they used iron filings to blow out the vats in the manufacture or purification of these particular goods, and somebody forgot to remove it. That goes not only—— [266]

Mr. Maiden: If the Court please, Mr. Miller runs far beyond the scope of the question asked him. I want to call the Court's attention, if I may, to the fact that the real issue and the only issue in this case is how much did The Stuart Company pay Vita-Food Corporation for this trade-mark, this trade

(Testimony of George Miller.)

name. There is no issue in this case as to fraud or as to the contract compliance or anything else. The only issue is what did Stuart Company pay The Vita-Food Corporation for the trade-mark.

Now, Vita-Food Corporation did not sell to The Stuart Company any concentrate. It only sold the name. The record will show that after this contract of November 28, 1942, the Stuart Company no longer used any of the vitamin concentrates manufactured by Vita-Food Corporation. I believe we are getting way beyond the real issue in this case and taking up needless time with a lot of immaterial matter.

The Court: Is The Stuart Company still using the name "the Stuart formula"?

Mr. Mackay: Yes, your Honor.

The Court: Then this seems to be all hypothetical. They didn't change from one name over to another. You are asking the witness about the needs and practicality of changing the trade name from one name to another, and this company didn't change from one name to another. So you are dealing with something that is speculative as far as I can see, and [267] a lot of this is cumulative. I think the suggestion is very well made.

Mr. Mackay: I will bear that in mind. I would like to make this observation, of course, that the evidence shows that the parties were contemplating, at least the officers of The Stuart Company were contemplating, the change of the name to show the unimportance of this particular trade name.

The Court: Yes, but they didn't change the name, and you are taking up a great deal of time.

(Testimony of George Miller.)

Mr. Mackay: I will shorten it, your Honor. I will keep that in mind.

The Court: We haven't time to explore a subject that isn't material.

Q. (By Mr. Mackay): I will call your attention to Exhibit 9 and to the label which is on the left side of the white paper. That has been identified as a label which was used by The Stuart Company prior to November 28, 1942, and particularly to the question or statement there: "An aqueous concentrate derived from natural food sources, fortified."

Mr. Mackay: I might state, your Honor, that that was changed as shown here by the other one.

The Court: That was a very small change, Mr. Mackay. The average person in the public wouldn't even notice it, unless they were accustomed to reading fine print on the labels. [268]

Q. (By Mr. Mackay): May I ask if a doctor would notice that? A. Yes.

The Court: That is right, a doctor would notice it. So would a trained person, but the point is the name "Stuart formula" was still used and the subject is practically the same, and it was still a vitamin concentrate.

Q. (By Mr. Mackay): You stated, Mr. Miller, that you had examined this product in October, 1942.

A. Yes, sir.

Q. I will ask you from your examination if that statement I just called your attention to on the label was correct?

A. Misleading in its entirety.

(Testimony of George Miller.)

Q. I will ask you if you were interested——

The Court: Did you say correct or corrected?

Mr. Mackay: I asked him if it was correct, and he said it was misleading.

The Court: You mean it was a natural?

The Witness: No, it was misleading. The statement says "natural food sources, fortified."

The Court: We have been all over that. It was represented to Mr. Hanisch that it was a natural vitamin and it has been testified at one time Vitamin C, derived from corn, was said to have been—was it Vitamin C? [269]

The Witness: Yes.

The Court: ——derived from corn, was said to have been a natural. At one time it was said to have been a natural vitamin, isn't that right?

The Witness: Yes. It has changed since then.

The Court: So this all has to do with the development of vitamins and the analysis of them and it is not really strictly material to the question we have before us. Now, what is the next question?

Q. (By Mr. Mackay): As a result of your examination of the product in 1942, was your company interested in manufacturing that same product?

A. No, we were not.

Q. Why not?

The Court: Whose company?

The Witness: Strong Cobb & Company.

The Court: Interested in manufacturing what product?

The Witness: "Stuart formula."

(Testimony of George Miller.)

Mr. Mackay: The product was then being manufactured by The Vita-Food Company.

The Court: What is the materiality of this, please?

Mr. Mackay: Well, if your Honor please, our case is just this: At this time——

The Court: Well, your case is what the intent of [270] the parties was in executing the agreement which is in evidence as Exhibit 12, upon which there has been very little evidence. Now, I will at this time return the agreement to you, Mr. Mackay, with this comment: This exhibit was received in evidence yesterday, or the day before, as Petitioner's Exhibit 12. I received it in evidence because I thought that it was for the convenience of counsel to offer it at that time. There has not been an adequate foundation laid for the receipt in evidence of this agreement. The testimony of Mr. Hanisch has been completed, direct and cross-examination. He was asked very little about this settlement agreement and I think that it was improper to receive it in evidence at the time it was received. Therefore, I am going to now reject the document and have it marked for identification as Exhibit 12, and ask you at the appropriate time to introduce some evidence relating to the settlement agreement; why it was entered into, what the intent of the parties was, and that is what your case is about.

Now, that will indicate to you why I will sustain the objections to a lot of descriptive testimony about

(Testimony of George Miller.)

the general business of the marketing of vitamins.
Read the last question.

(The question was read.)

(The document heretofore marked Petitioner's Exhibit No. 12 was rejected.) [271]

Mr. Maiden: If the Court please, I would like to move that that answer be stricken from the record as being irrelevant and immaterial to any issue in this case.

Mr. Mackay: I would like to be heard on that.

The Court: Mr. Miller, when did you begin manufacturing a vitamin for The Stuart Company?

The Witness: The first invoice is dated August, 1943.

The Court: Now, from your testimony it appears that these vitamins that were sold to the public are something of a prescription.

The Witness: That is right.

The Court: They are compounded probably in very much the same way as a tablet which has two or three ingredients in it?

The Witness: Yes, your Honor.

The Court: Like empirin with codine in it, or something like that? You buy codine in wholesale quantities; you buy the other ingredients in wholesale quantities. Now, after every vitamin has been developed it became—the different commodities became, the different vitamins became commercial commodities and, apparently, anyone wanting to go into

(Testimony of George Miller.)

the business of selling them can do just that as they can go into the grocery business, but there are business standards and there are professional standards that have to be [272] followed.

Now, we have been told a great deal about that. You apparently were asked to put up a product for The Stuart Company in—what date did you say?

The Witness: August, 1943.

The Court: August of 1943, and at a certain time you stopped doing that. Is that right?

The Witness: No.

The Court: You just testified that you did. You were no longer interested in——

The Witness: In October of 1942.

The Court: When did you begin?

The Witness: August, 1943.

The Court: You couldn't begin in 1943 and end in 1942.

The Witness: I am sorry. You misinterpreted. We were requested to quote on a product. [273]

The Court: I want to cut short this extensive testimony on immaterial matter. Now, did you make up something that they sold?

The Witness: Not until August of 1943.

The Court: All right. When did you stop making it?

The Witness: Never stopped.

The Court: Now, what is the meaning of your last question to Mr. Miller, about which he started to testify that at some time they were no longer interested in making something?

(Testimony of George Miller.)

Mr. Mackay: Our position is this——

The Court: I know what your position is. What is your last question to this witness?

Mr. Mackay: My last question, I think, was whether his company was interested in making the product of The Stuart Formula at that time, which had a molasses base. That was for the purpose——

The Court: We have had just reams of testimony on the point that nobody wanted to make up a vitamin with a molasses base. Now, you didn't want to and you never did, did you?

The Witness: No, sir.

The Court: All right. That ends that.

Mr. Mackay: That is all.

The Court: Mr. Maiden. [274]

Cross-Examination

By Mr. Maiden:

Q. Mr. Miller, I believe you testified that you first saw The Stuart Formula, that is the concentrate, in October of 1942. A. Yes, sir.

The Court: What do you mean by "concentrate"; this liquid stuff?

Mr. Maiden: The liquid stuff.

The Court: All right.

Q. (By Mr. Maiden): What was the occasion for your first seeing samples of that Stuart Formula?

A. A request for a quotation from The Stuart Company.

(Testimony of George Miller.)

Q. What sort of a request did The Stuart Company make of you?

A. Asked us if we could make this product and what price we would make.

Q. What time in October of 1942 was that, do you recall?

A. I don't know the date. That is a long time ago.

Q. Did they present some samples of the formula to you?

A. We picked up the samples ourselves from trade shelves. We do that, as a matter of fact, of course——

Q. Was that product being sold in your territory at that time? [275]

A. Never heard of it, sir.

Q. Never heard of it? A. No, sir.

Q. How many separate samples did you have?

A. If I recall, at that time, approximately three or four were sent in by Mr. Strathe, our sales vice-president.

Q. Where was Mr. Strathe located?

A. In Cleveland, but he had been traveling the West Coast.

Q. And he picked up three or four samples?

A. That is right.

Q. Did all those samples bear control numbers?

A. I don't remember.

Q. No recollection of that at all?

A. No analysis was made of the product; merely physical observation.

(Testimony of George Miller.)

Q. What is a control number?

A. A number given to the product at the time of manufacture to identify the date and time and the methods under which it was manufactured.

Q. Does that appear on the label?

A. Appears on the label of every good pharmaceutical company.

Q. You would assume they had control numbers, is that right, since they were picked up off the shelves? [276]

A. I don't know. I can't answer that.

Q. Is it lawful to sell them without control numbers on them?

A. Yes, sir.

Q. It is. Did you have any written report made for you on those samples?

A. By our laboratory?

Q. Yes.

A. No. No analysis was made; merely physical observation and immediate recognition of the base of the product.

Q. In other words, you did not actually analyze the liquid; you simply looked at it and read on the label its contents, is that right?

A. That is right.

Q. Then you state that from that information you determined that you could duplicate that concentrate?

A. Without the base, with a different base.

The Court: Well, in liquid form or——

The Witness: In liquid form, your Honor, yes.

The Court: What was the base you were going to use?

(Testimony of George Miller.)

The Witness: Malt, which is recognized as a standard and very acceptable base; different types of malt.

Q. (By Mr. Maiden): Now, sir, have you been testifying here from any kind of written report or are you just testifying from your [277] memory?

A. From my memory.

Q. I believe the Court brought out the fact that you do now supply The Stuart Company with its concentrate and that you have been supplying The Stuart Company since August of 1943.

A. That is right.

The Court: They are still selling vitamins in liquid form?

The Witness: Yes, your Honor.

The Court: That is what we mean when we use the term "concentrate," is that right?

The Witness: Yes.

The Court: Otherwise we call it capsules, tablets?

The Witness: We call it liquid syrup vitamins.

The Court: Then, let's call it by its right name.

Q. (By Mr. Maiden): Is The Stuart Company now one of your large customers?

A. Yes, they are.

The Court: How much do you sell them a year?

The Witness: At the present time—it has varied anywhere from \$100,000.00 up to approximately \$785,000.00—pardon me, your Honor, I don't have those figures with me, but approximately in that neighborhood. [278]

(Testimony of George Miller.)

The Court: Sell them anything else besides the liquid vitamins?

The Witness: Yes, we have made up and created new products for The Stuart Company. The syrup is only a fraction of that.

The Court: What other products?

The Witness: We make the Stuart tablets, which are the A, B, C. We make the hematinic, which is a liver and oil; AB-complex, which is a high potency; B-complex, and a dental product known as Viorol.

The Court: Those are all sold under various names?

The Witness: Yes, your Honor.

The Court: Is The Stuart Formula used only on the syrup-vitamin?

The Witness: To the best of my recollection, The Stuart Formula is used on the liquid.

The Court: Only on the liquid?

The Witness: To the best of my recollection.

The Court: But you are not sure of that?

The Witness: That is right. It may be used on the tablets. I am not sure of that. I haven't seen the label for some time.

Q. (By Mr. Maiden): Mr. Miller, are the vitamins, the liquids and the tablets that you manufacture for The Stuart Company, and other [279] items that you manufacture, natural or synthetic?

A. A combination of both. The vitamins themselves in most cases are synthetic, with the exception

(Testimony of George Miller.)

of vitamins A and D, and the vitamins contained in it are not even considered in figuring potencies.

Q. Now, I want to ask you to examine this bottle of Vitall, which is the product of The Vita-Food Corporation, and I will ask you to examine **that** and state if that doesn't have a molasses base.

A. On the label it states "Cane plant concentrate" and could well be a molasses base.

Q. You interpret that as being a molasses base?

A. Normally, or sorghum.

Q. Would you please open that bottle? I believe you testified——

The Court: Have you a spoon?

Mr. Maiden: I didn't bring a spoon.

Q. (By Mr. Maiden): Now, I want you tell the Court whether or not that shows any fermentation.

A. I wouldn't like to judge from a physical look of the product. I would like to take this through the laboratory and find out. We have regular fermentation checks.

Q. Mr. Miller, I understood you to say on your direct examination that you didn't have an analysis made of that [280] concentrate, that you only examined what it contained.

A. The analysis was made on the active ingredients of the product itself. The fermentation was evident because the bottle popped, and we ran through a fermentation of the product at that time, but that is a physical check, not a strictly chemical analysis.

Q. How do you check for fermentation?

(Testimony of George Miller.)

A. We have a recognized fermentation check, which is recognized by the American Pharmaceutical and the Food and Drug Administration.

Q. Does this indicate any fermentation to you?

A. As I said before, I would rather not pass judgment. Fermentation can be in small quantities, depending on the age of the product too.

Q. Do you detect any fermentation on that?

A. Not at the moment.

Q. I believe you testified on direct examination, that is, in effect, that molasses had been forbidden for many years in the pharmaceutical field, because it always ferments.

A. Unless processing is taken to completely pasteurize and sterilize the molasses to remove the normal bacterial content. You see, molasses is the base for the creation of yeast and alcohol. It is highly fermentable.

Q. So, simply having a molasses base doesn't always mean you will have fermentation? [281]

A. Not if proper measures are taken, and proper pasteurization, but that is a very expensive process.

Q. Do you know that The Vita-Food Corporation has been selling this product for over five years on the market?

A. I never saw it before.

Q. You don't know that?

A. I don't know that product.

Q. Now, I believe you stated on your direct examination that you could take a product and, just by examining its label, noting its contents. just by

(Testimony of George Miller.)

a visual inspection, you could determine that you could duplicate that product?

A. In most cases that is generally true, yes.

Q. I didn't understand that you made any exceptions.

A. Well, the pharmaceutical field is a tremendous field. The chemical field is, too. I couldn't be that brazen. I am speaking of normal, standard formulation, yes.

Q. I will ask you to examine the contents of that bottle and tell the Court whether or not you can duplicate that product.

A. I can duplicate the product as far as the active ingredients are concerned, but I don't care to fool around with a cane sugar base; that is, an extract base, they call it, which would be molasses.

Q. So that you admit here, now, that you cannot duplicate that product? [282]

A. I didn't say that. I said I don't care to duplicate it.

Q. Well, I want to know if you can duplicate it.

A. If you ask that as a special research job, yes, we can do it.

Q. You can? A. Yes.

Q. Notwithstanding that you have no idea on earth how the composition is made?

A. After all, you are stating active ingredients, and that is the important part of that product. The base is just flavor, and immaterial.

Q. Isn't there some special skill or knowledge in the blending of these various vitamins in the base?

A. *Secundum artem*. That is the most honored

(Testimony of George Miller.)

expression in the pharmacopoeia. That means excellence in the art of compounding.

Q. So that there are no longer in the pharmaceutical field, so far as you know, any formulas for making any of the medicines and vitamins and things of that nature, that are secret and that are not known by all the manufacturers?

A. With the exception of certain patented marks which none of us will touch. The chemical science has advanced to a point where qualitative and quantitative analyses can be made on practically every product on the market. [283]

Q. Was that true in January, 1941?

A. Yes, sir.

Q. Now, you spoke of many vitamin products. I will ask you if, in 1940, in the beginning of 1941, if the vitamins that were put out didn't contain just the single vitamins.

A. No, that is not true. The advent of vitamins goes back to cod liver oil, when we put up a U.S.P. standard of vitamin A and D. Companies like Parke-Davis put out Irdola which is a combination of A, B, and B-complex. The Lilly Company put out Melvaron which contained A and D and B-complex factors, in a palatable syrup base.

Q. Now, did you ever see or test any of The Stuart Formula tablets? A. No, sir.

Q. You did not? A. No, sir.

Q. When you testified that, as of October, 1942, there was nothing new or unusual about The Stuart Formula composition, did you mean for the Court

(Testimony of George Miller.)

to understand that this was true in January, 1941?

A. I would say yes.

Q. That is your positive statement on that, Mr. Miller?

A. Yes, sir.

Q. Mr. Miller, when you removed that top from this [284] bottle of Vitall, you didn't notice or hear any popping sound?

A. No, sir, but it is a bad cap. It is a sprung cap.

Mr. Maiden: That is the liquid concentrate, your Honor, that we have been speaking about.

I believe that is all.

The Witness: Thank you.

Mr. Mackay: That is all.

(Witness excused.) [285]

Whereupon,

ROBERT H. DUNLAP

called as a witness for and on behalf of the Petitioner, having first been duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Robert H. Dunlap.

Direct Examination

By Mr. Mackay:

Q. Mr. Dunlap, what is your occupation?

A. Attorney at law.

Q. How long have you been an attorney at law?

A. Twenty-six years.

(Testimony of Robert H. Dunlap.)

Q. Where are you now practicing?

A. Pasadena, California.

Q. How long have you been in Pasadena?

A. Ten years.

Q. Are you acquainted with Mr. Hanisch?

A. I have known Mr. Hanisch since September, 1914.

Q. Have you been his attorney since approximately December, 1941?

A. Yes, sir, and before that.

Q. Did you assist in the organization or organize the Stuart Company and the Shaler Food Products Company?

A. I did.

Q. After they were organized, did you become the counsel [286] or attorney for those two companies?

A. Yes, sir.

Q. Did you also become an officer of either one of the companies, or both?

A. Of both of them.

Q. In what capacity?

A. Secretary of the Stuart Company and, after the middle of 1942—prior to that time assistant secretary—secretary of the Shaler Food Products Company, during its entire corporate life.

Q. Were you secretary of the Stuart Company from, say, about June, 1942, up to and including at least November 28, 1942?

A. Up to the present time.

Q. Were you familiar with the fact that the Stuart Company was under contract to purchase Vita-Food products from the Vita-Food Company?

A. Yes, sir.

(Testimony of Robert H. Dunlap.)

Q. I show you a contract at this time and ask you to please identify it, or rather, I show you an instrument and ask you to identify it.

A. This instrument was typed by myself in my office during the night of November 27th and 28th. The signatures on the document are respectively that of Mr. Oscar Wiseman, Mr. Manisch, and myself; my own signature. The initials in several [287] places in the contract, "R.H.D.," are my initials.

Mr. Mackay: Now, if your Honor please, at this time I introduce the exhibit which was received as Exhibit No. 12, and now, at the Court's order, has been marked for identification as Exhibit 12. I made the same statement that the secretary had not made a true and correct copy in that the interlineations had not shown themselves. At this time, with your Honor's permission and counsel's permission, I should like to offer the duplicate original here, which is signed and which has been identified by this witness.

Mr. Maiden: No objection.

The Court: You mean you want to substitute that exhibit marked for identification?

Mr. Mackay: Yes, your Honor.

The Court: All right. You may do that. Mark it for identification.

Mr. Mackay: I am offering it in evidence now.

The Court: Is this the settlement agreement?

Mr. Mackay: Yes.

The Court: You haven't laid any foundation for that. That is the whole basis. We don't know

(Testimony of Robert H. Dunlap.)

the intent of the parties, the circumstances under which they executed it, or anything else. If I am correct in my recollection of the record, isn't that right? If I am incorrect, I would like to clear it up in my mind. [288]

Mr. Mackay: Well, I think it is probably best that I do lay a more sufficient foundation and I appreciate your suggestion.

Q. (By Mr. Mackay): Now, Mr. Dunlap, this agreement is entitled—that you just identified—“Agreement of Settlement of Litigation and Cancellation of Contract.” A. Yes, sir.

Q. Now, I will ask you if you are familiar with any litigation which was at that time pending or threatened between the Stuart Company on the one hand and the Vita-Food Corporation on the other.

A. Yes, indeed; very familiar. I had worked for approximately three weeks off and on in drafting a complaint for cancellation of the contract of May 5, 1941, charging fraud, charging failure of consideration.

Q. Just a moment. I would like to ask you if you were familiar with the contract which—this contract I now have in my hand—you were attempting to cancel and which was referred to in the heading, “Agreement of Settlement of Litigation and Cancellation of Contract.” A. Yes, sir.

Mr. Maiden: Read that, please.

(The record was read.)

Mr. Maiden: I object to that on the ground, if

(Testimony of Robert H. Dunlap.)

the [288A] Court please, that calls for a conclusion of the witness on the issue that is within the province of this Court to determine, and that is what the money set forth in this agreement was paid for, whether it was paid for the formula or whether it was paid for the cancellation of the contract.

Mr. Mackay: I can't put it all in at once.

The Court: The question is, whether he was acquainted with another agreement. If I might suggest, Mr. Mackay, I think the question would be better if you would ask the witness if he is acquainted with the agreement of May 5, 1941, which is Exhibit 8 in this case.

Mr. Mackay: Yes, your Honor. I think that is more scientific.

Q. (By Mr. Mackay): I call your attention, Mr. Dunlap, to the first paragraph of the agreement you identified, which refers to the agreement of May 5, 1941, which has been introduced in evidence here as Exhibit 8.

A. I was then and I am today.

Q. Now, will you please tell the Court, as briefly as you can, the nature of the litigation and the disputes that were then being had between the two companies, which led to the drafting of the contract which you have identified here and which is dated November 28, 1942?

A. Mr. Mackay, I did not finish my statement in answer [289] to your question. There was also not only threatened the litigation, which I was about to file, but there had actually been filed the com-

(Testimony of Robert H. Dunlap.)

plaint which has been introduced in evidence here, Superior Court case, I think it is Exhibit 15.

Mr. Maiden: That is correct, Mr. Dunlap. It is correct, Exhibit 15.

The Witness: That case was pending. The disputes between the parties, I will try to make that brief, were that The Stuart Company claimed to own the trade-mark, "The Stuart Formula."

The Court: What is that?

The Witness: The Stuart Company claimed to own the trade-mark, "The Stuart Formula."

The Court: Will you make that plainer?

The Witness: For the first time, in October of 1942, the Vita-Food Company insisted that The Stuart Company and Mr. Hanisch could not distribute any vitamins or vitamin concentrates or pills unless they were purchased from the Vita-Food Corporation. The Stuart Company contended that the product being supplied to it by the Vita-Food Corporation was endangering the business of the company and that, not only was the Stuart Company but its officers were in danger of being subjected to a Food and Drug Administration penalty and perhaps prosecution.

The Vita-Food Company claimed to own the trade-mark, [290] "The Stuart Formula." The Vita-Food Company claimed that The Stuart Company could not use its own name in distributing vitamins.

That is all that I recall at the moment. There were more. I am trying to make it brief.

(Testimony of Robert H. Dunlap.)

Q. (By Mr. Mackay): Now, Mr. Dunlap, did you, as secretary and counsel of The Stuart Company, carry on the negotiations principally with anybody representing the Vita-Food Company?

A. I did. I had four conferences with Mr. Oscar Z. Wiseman.

Q. Who is Mr. Wiseman?

A. Attorney for and vice-president of Vita-Food Corporation.

Q. Did you try to get in touch with Mr. Lewis?

A. I did.

Q. Were you able to?

A. Mr. Lewis referred me to Mr. Wiseman and stated he wanted all negotiations conducted with Mr. Wiseman.

Q. Did you carry on the negotiations then, you and Mr. Wiseman, after that?

A. Yes. I carried on all the negotiations except for two conferences, one on Sunday afternoon, November 20th, and the other on the 27th, which resulted in the signing of the document, Exhibit 12 for identification. [291]

Q. Well, you stated a moment ago that you became—I will withdraw that.

When you had your controversy with the Vita-Food Company at that particular time, did the registration of the trade-mark come up?

A. Incidentally.

Q. Did you pass upon it or did you seek the advice of other counsel?

A. Both. I pulled the books off the shelves

(Testimony of Robert H. Dunlap.)

myself, and I also sought the advice of other counsel.

Q. As to what?

A. As to who owned the trade-mark, "The Stuart Formula."

Q. And what was the advice?

A. The advice was that The Stuart Company owned it.

Q. Do you know for what reason?

A. Yes. This is a 1920 Act registration. A true trade-mark has to be a coined word or a symbol. The true trade-mark cannot consist of a combination of proper names or dictionary names. It must be a coined word or a symbol. A 1920 trade-mark registration, a 1920 trade-mark is acquired by the actual user and it can be registered, which produces prima facie evidence of ownership, but only prima facie evidence of ownership after it has actually been used in interstate commerce for one year, exclusively by the person whose name is connected with the trade name, by the consuming public for the trade. [292]

Q. Now, Mr. Dunlap, I refer you to Exhibit 15 and particularly to a letter dated October 8, 1942, which is attached to that exhibit and appears to have come from the Vita-Food Corporation to The Stuart Company.

A. Yes, sir.

Q. Did you receive that letter at that particular time or were you consulted about it?

A. I saw it about a half hour after it was received at the offices of The Stuart Company.

(Testimony of Robert H. Dunlap.)

Q. And that letter, I think, purports to be a declaration on the part of the Vita-Food Corporation, they intended to cancel the contract with respect to certain particulars?

A. That is correct, with respect to certain particulars only, but you will note that it also contains the language, "In all other respects the contract remains in full force and effect," meaning that the Vita-Food Company still contended that The Stuart Company had to purchase all of its products from the Vita-Food Corporation.

Mr. Maiden: Now, if the Court please, I am going to ask that Mr. Dunlap participate in this case as a witness only and not undertake to argue the merits of this case and to inject into this case his legal opinions. He is here as a witness to testify as to facts only. I object to his last statement and ask that it be stricken from the record, as being argumentative and improper. [293]

The Court: I don't think that was argumentative. We have seen the letter before. He is referring to a sentence in the letter.

Q. (By Mr. Mackay): That letter refers to a paragraph 6. You said you were familiar with paragraph 6 of the agreement?

A. Exhibit 8, yes.

Q. Will you please tell the Court what the effect of cancellation of that paragraph 6 would be, as required in that notice of November 8th?

Mr. Maiden: That calls for the legal opinion of this witness. He is not testifying as to facts.

(Testimony of Robert H. Dunlap.)

He is trying to get into the record his own legal interpretation of this contract.

The Court: Is there any meeting between the parties as to the meaning of clause 6 in that agreement? I understood there was not. In fact, I believe yesterday you stated that the clause in paragraph 6 related to exclusive rights to sell. Isn't that true?

Mr. Maiden: Yes, that is true, your Honor.

The Court: But, if certain conditions were not met, that the exclusive right to sell would end upon giving notice, isn't that right?

Mr. Maiden: That is right.

The Court: Isn't this cumulative testimony here? [294]

Mr. Maiden: It certainly is cumulative testimony and it is boring upon an attorney undertaking to get his opinion to the Court.

The Court: He can testify as an expert witness.

Mr. Maiden: That is true, but he hasn't been so qualified as an expert witness.

The Court: Maybe Mr. Mackay thought he qualified him as an expert.

Mr. Mackay: He has been a lawyer for 26 years. He is an expert on that.

The Court: If there is any ambiguity on the contract, we must know the intent of the contract. Is there anything ambiguous in clause 6 of the contract?

Mr. Maiden: Your Honor, it is just as plain as anything could possibly be.

(Testimony of Robert H. Dunlap.)

The Court: All right. Then there can't be very much objection to Mr. Dunlap's testifying about it.

Mr. Maiden: I have no objection to his testifying what his understanding was that the various provisions should mean, as going to the intent of the parties. The thing I was objecting to, if the Court please, was his giving a legal opinion here as to what effect, as a matter of law, a certain provision in the contract would have. I believe the Tax Court is fully competent to take care of that matter.

Mr. Mackay: I will withdraw that. [295]

The Court: No, just ask your witness over again. The objection is overruled for the present. Will you start all over again on that? I think it is important.

Q. (By Mr. Mackay): Mr. Dunlap, in the letter of October 8, 1942, next to the last paragraph, it states in effect that The Stuart Company had failed to meet its quota for a 60-day period and that therefore your exclusive right to sell under said contract hereby terminates in accordance with paragraph 6 thereof. Now, I will ask you what effect upon the company, the company's earning capacity, the termination of only that right to exclusively sell would have had upon the company.

A. Well, the company was losing money at the time. I am sorry I can't answer your question directly. I will say that we—I was and we all were, "we" meaning the company, extremely anxious to have this contract terminated. We couldn't make

(Testimony of Robert H. Dunlap.)

money as long as the contract was in effect, whether it was exclusive or non-exclusive.

Q. Now, you stated you got in touch with Mr. Lewis regarding the difficulties you were having.

A. I tried to, but I talked to Mr. Wiseman.

Q. Yes, and that he referred you to Mr. Wiseman. Now, you did go to Mr. Wiseman. Did you have a conference with him?

A. I had three conferences.

Q. Will you please tell the Court when you had the [296] first conference with Mr. Wiseman and the substance of the conversation you had with Mr. Wiseman at that time?

A. May I refer to my diary?

Q. Quite all right.

A. If you want the exact dates, I can give them to you.

The Court: What office did you hold with the company at that time?

The Witness: Secretary. I will give you all these dates, if I may. May I do that, your Honor, so as not to have to refer to the diary again?

On the Thursday before November 20, 1942, that would be November 17, 1942——

Q. (By Mr. Mackay): Is that the first conversation you had with him? A. It was.

Q. Will you please state to the Court the substance of the conversation?

A. I told Mr. Wiseman that we were entirely dissatisfied with the performance of the Vita-Food Corporation, that Mr. Lewis had gone back on

(Testimony of Robert H. Dunlap.)

some—so many promises, that the contract was fraudulent in its inception; that they never did have a natural vitamin base; that the Stuart Company simply could not go ahead with the outrageous—I remember using that expression—pricing of the product to the Stuart Company and that we were going to break with the Stuart Company—with the [297] Vita-Food Corporation.

The Court: What did you mean when you used the term “outrageous price”?

The Witness: I told Mr. Wiseman at that time that we had learned during the previous month that the 50 per cent payment, which was being made on placing the order, was more than the entire cost of the orders to the Vita-Food Corporation. I told him that we had obtained quotations from reputable manufacturers, who actually had a plant and controls to give us a better product for not as much as two-thirds of the price we were paying the Vita-Food Corporation.

In other words, we could buy for two-thirds, or one-third less, a better product from a reputable manufacturer, who would sell us something that wasn't exploding and embarrassing the company and wouldn't subject us to the criticism for short count in the tablets. I told him that consistently and persistently the tablet preparations were short in count. I, myself, had counted the tablets, and we had that verified by a certified public accountant. I told him we had obtained information that the original Stuart formula, instead of being the

(Testimony of Robert H. Dunlap.)

result of studies by the California Institute of Technology, actually was made in a garage; that the original product, the original batch delivered under the February 3, 1941, agreement, was unstable and it was prepared in three days' time and they could not possibly have a stable product because it [298] would take much longer than that to run the tests necessary to bring out a reputable drug item. I told Mr. Lewis that we were through, that I was at work at the time—told Mr. Wiseman that I was at work at the time on a contract, on a complaint charging fraud, charging the failure of consideration, and asking for a declaration of rights, and I would give him 48 hours to make up his mind whether he desired to accept the proposition of settlement which I then made to him.

The Court: What was that?

The Witness: I told him first we would pay him \$15,000.00 for the entire business, plant—entire business of the Vita-Food Corporation; that we would pay them the cost of the merchandise they had on hand, but we were not going to pay any such inflated price as the Vita-Food Corporation was then getting from The Stuart Company. I told him, to sweeten the transaction, so that Mr. Lewis would not be out of business with no occupation, we would for a while employ him in a consulting capacity to advise our new manufacturing connections and to advise with us concerning such manufacturing problems as might arise in connection with the change-over to a new supplier. At that

(Testimony of Robert H. Dunlap.)

conference, I believe, I got as high as \$50,000.00.

Q. (By Mr. Mackay): Now——

A. Mr. Wiseman said they wanted a half a million dollars. [299]

Q. Now, did you—this conference, of course, was after you received the termination notice of October 8th?

A. Yes, and after we had applied to the——

Q. Subsequently to this first conference, did you have a subsequent conversation with Mr. Wiseman?

A. I did, for 2½ hours, on the afternoon of Sunday, November 20, 1942.

Q. Where was that?

A. Part of the time in my office in Pasadena. Mr. Hanisch was also present, and part of the time at a restaurant across the street.

Q. Was Hanisch present at the restaurant?

A. He was.

Q. Can you give the Court the substance of that conversation?

A. Yes. Mr. Hanisch stated that he wanted to make one final effort to arrive at a settlement of the disputes between the parties, and I think he used the expression, "Get off the hook with Vita-Food and get a reliable manufacturer," and he was prepared to pay more than I had previously offered, because he did not want to drag The Stuart Company through the courts because necessarily it would be a bitterly fought case and we would have to establish the fact that we had been selling a product which was not reliable, unstable, did not

(Testimony of Robert H. Dunlap.)

meet Food and Drug requirements, unsatisfactory to the doctors and the [300] consuming public.

Mr. Maiden: You are making an excellent advocate, Mr. Dunlap.

Mr. Mackay: Pure statement of facts. I am very proud of him.

The Witness: I stated what Mr. Hanisch said. Mr. Wiseman maintained, he said he didn't want to get into too many personalities about the matter; if we were going to make a settlement, keep personalities out of it. Mr. Wiseman said he wanted—I think his first statement was—\$350,000.00.

The Court: Who said that?

The Witness: Mr. Wiseman—to divorce the relationship between the parties so that we could go out and buy from whomever we chose.

The Court: We will take a short recess at this time.

(Short recess taken.)

The Court: Proceed.

The Witness: Your Honor, may I correct the dates in my testimony. My first meeting with Mr. Wiseman was on November 18th, a Wednesday. Next was on November 20th, a Friday.

Q. (By Mr. Mackay): Now, the evidence shows the complaint was filed by the Vita-Food Company, which is now Exhibit 15. I will ask you if you, as the attorney for The Stuart Company, had [301] prepared a complaint against the Vita-Food Corporation.

(Testimony of Robert H. Dunlap.)

A. Yes, a longer one than Mr. Wiseman filed in his first complaint.

Q. You mean he beat you to it?

A. He beat me to it.

Q. Have you got a copy of it?

A. Yes, I have for my files one of the copies of the document. I had many, but in order to save filing space, I destroyed all but this one.

Q. Was this complaint filed in court?

A. It was not filed in court.

Mr. Mackay: I should like to offer in evidence, if your Honor please, a copy of this complaint.

Mr. Maiden: This doesn't seem to be a complaint, Mr. Mackay. It is not signed or verified in any respect. The one that you have given me, anyway.

Q. (By Mr. Mackay): Was it signed?

A. Never was; never filed.

Q. That is the draft of the complaint you had intended to file against them?

A. That is correct.

Mr. Maiden: I have no objection to it.

The Court: Did Mr. Hanisch see this?

The Witness: Oh, yes; thoroughly discussed it with [302] him, your Honor. As a matter of fact, that is about——

The Court: Did he approve of it?

The Witness: Qualifiedly. He didn't think it was strong enough.

The Court: I don't like to be meticulous about

(Testimony of Robert H. Dunlap.)

this, but I would suggest this be marked for identification.

Call Mr. Hanisch and ask him about it, because, after all, Mr. Dunlap was acting in the capacity of counsel.

The Witness: And secretary.

The Court: Yes, but then Mr. Hanisch was really the man that was director of the company, wasn't he?

The Witness: That is right, true.

The Court: And he was really your client?

The Witness: That is true.

The Court: He may have been acting in dual capacity, but he was the boss.

The Witness: Definitely.

The Court: So, let's have this marked for identification, then, as Exhibit 16. I believe that is the next number.

The Clerk: Yes, your Honor. I don't seem to have Exhibit 15 amongst the Court's exhibits. That was a complaint.

The Court: I think counsel are using some of those exhibits, and the Court can get them back after while.

(The document above referred to was marked Petitioner's Exhibit No. 16 for [303] identification.)

Q. (By Mr. Mackay): Now, Mr. Dunlap, as a result of the negotiations which you had with Mr. Wiseman, was there a contract entered into?

A. A settlement?

(Testimony of Robert H. Dunlap.)

Q. Yes. A. Yes.

Q. And that has been referred to here as the document identified as—or submitted for identification as—Exhibit 12? A. Yes, sir.

Q. I will ask you to please tell the Court—to study that document and from your knowledge tell the Court—just what you were trying to say.

A. We were trying to get rid of the pending litigation and we were trying to divorce ourselves entirely from the Vita-Food Corporation and all relations with them, and settle our various disputes, principally trying to get for Mr. Hanisch and The Stuart Company—and I advisedly say Mr. Hanisch and The Stuart Company—freedom to go out and buy a better product at a lesser price so that at long last The Stuart Company could begin to make some money.

At that time Mr. Hanisch held notes of the company for \$70,000.00. He had an extremely unsatisfactory product. He was pouring money into trying to sell it, and the company was [304] pouring money——

Mr. Maiden: I object to that answer as going far beyond the scope of the question.

The Court: You may cross-examine, Mr. Maiden.

The Witness: Incidentally and as a very minor matter, in order to wash up the whole thing, I suggested getting a quitclaim of whatever rights there might possibly be, so that they couldn't raise it again—from the Vita-Food Corporation of the

(Testimony of Robert H. Dunlap.)

trade-mark, "The Stuart Formula." We believed we owned it at that time, but the objective that we had was so that we could at long last go out and have this company begin to make some money.

Q. (By Mr. Mackay): What significance did the words "cancellation of contract" have in the heading?

A. That was the principal part. We wanted to get rid of the litigation so that we wouldn't have to prove what an inferior product we had been selling.

Q. Did the litigation arise because of the contract of May 5, 1941?

A. Yes, because of the contract of May 5, 1941. At the very time of the notice of cancellation—at the time that it was in preparation by the Vita-Food Company—I was already at work on a—that is complaint marked for identification Exhibit 16, to rescind the agreement in its entirety. In other words, by that time we became very sorry we had ever met Mr. [305] Lewis.

Mr. Maiden: Thank you, Mr. Dunlap.

Q. (By Mr. Mackay): Now, at or about the time this cancellation agreement was entered into, were there discussions with respect to the continuance of Mr. Hanisch's ownership of the stock and also his requiring him to manage, continue as managing agent of The Stuart Company?

A. Very definitely and extensively.

Q. And who insisted on those provisions going in?

A. Mr. Wiseman.

(Testimony of Robert H. Dunlap.)

Q. Do you know for what reason?

A. Mr. Wiseman said that in his opinion Mr. Hanisch was the sparkplug of the Stuart Company, and without Mr. Hanisch nothing would happen; it wouldn't be any good, wouldn't do any business; and he wanted Mr. Hanisch to be tied in and remain as managing agent of The Stuart Company and continue to devote a great portion of his time to The Stuart Company so the job of merchandising would go on, and get the payment per bottle provided for in paragraph 5, whether the name of "The Stuart Formula" was used or not.

As a matter of fact, I had given my opinion——

The Court: Don't go beyond the scope of the question.

The Witness: All right. [306]

Q. (By Mr. Mackay): I call your attention to paragraph 3—or 7, I mean, of the agreement.

A. In the event of the abandonment of the trade-mark——

The Court: He hasn't asked you a question.

Q. (By Mr. Mackay): I call your attention to paragraph 7, and particularly to what is indicated there as an insertion in the contract after it had been typed, "of the abandonment of said trade-mark, 'Stuart Formula,' by said party."

Who said that? A. Mr. Wiseman.

Q. Now, Mr. Dunlap, that agreement I believe provides that The Stuart Company would pay a total of \$197,700.00. A. Yes, sir.

Q. As I recall, \$35,000.00 was to be paid in cash,

(Testimony of Robert H. Dunlap.)

and the balance, \$40,000.00, in monthly installments of \$4,000.00 each. I think also the contract provides that \$122,700.00, or the balance of the \$197,700.00, be paid over a period of time and based upon unit sales.

A. Right.

Q. Now, Mr. Dunlap, can you tell the Court what, in your opinion, that payment was made for, the \$197,700.00?

Mr. Maiden: I object to Mr. Dunlap's giving any of his opinions. I want Mr. Dunlap to testify as to intentions. [307] He can do that. What was the intention of the parties—but I object to his giving any opinion.

The Court: Objection sustained.

Q. (By Mr. Mackay): I will withdraw that. I will ask you what was your intention, as an officer of the company, with respect to the payment of that sum of money.

A. The intention was to place The Stuart Company in a position so that it could buy a product at a realistic price and make a profit. A better product at a lesser price would put the company in the black, and we wanted to get the freedom.

Q. Freedom from what?

A. From the obligation to buy only from Vita-Food.

Q. And those obligations were under the contract of May 5, 1941?

A. Correct. We wanted to settle all disputes with Mr. Lewis and the Vita-Food Company. We

(Testimony of Robert H. Dunlap.)

wanted to get back the stock which had been promised him, but which had not been issued.

Q. Promised whom? A. Mr. Lewis.

The Court: How many shares?

The Witness: 300 shares, your Honor.

The Court: Which company?

The Witness: The Stuart Company—in order to be [308] factually accurate, your Honor, he was to get 150 shares of the Shaler Food Products Company and 150 of The Stuart Company, as originally set up, and when the companies merged, that meant 300 shares in The Stuart Company.

Q. (By Mr. Mackay): Explain what you mean by “merged.”

A. Under the California Civil Code there is a provision for merging one corporation into another. That statutory procedure was followed and the two companies were actually merged. The Shaler Food Products Company was merged into The Stuart Company. We wanted to get also out of the necessity of exposing or trying the lawsuit and thereby arming the competition with information as to the character of our product which we were then selling. Incidentally, Mr. Hanisch did not wish to have his own son's name—that is, Stuart—used by anyone else than himself.

Q. How would a litigation affect—what did you think at that time, what effect did you think the litigation would have had upon the business of The Stuart Company, its name?

A. Well, a product which was being sold for hu-

(Testimony of Robert H. Dunlap.)

man consumption, we didn't care to prove it was actually compounded in a kitchen of a Mr. Ellis, who was an instructor at the California Institute of Technology at that time. We didn't want to prove that the product was exploding and had been exploding, and apparently Mr. Lewis could do nothing about it. [309] We didn't want to prove that the label statement that the product was compounded primarily from natural source was actually misleading. We didn't want to prove that there was no such thing as a secret process involved in the production of the then "Stuart Formula." We didn't want to be in the position of proving that the Vita-Food Corporation was of little or no financial responsibility and that we had been dealing with that kind of a manufacturer. We didn't want to prove that. We didn't want to supply information which might have led to a Food and Drug seizure, all of which would have been used to our detriment by the competitors.

Q. I will ask you, Mr. Dunlap, to explain what you had in mind when you wrote paragraph 4 of the agreement.

The Court: Of what?

Mr. Mackay: Of the agreement of November 28, 1942, which is marked for identification as Exhibit 13.

The Witness: I knew that if we were paying a royalty, we were recognizing some kind of ownership. Therefor, I insisted on the use of the expression "royalty basis" so that it would not appear we

(Testimony of Robert H. Dunlap.)

were paying a royalty to anybody. I had in mind that that was merely a means of describing the measurement of payments, so much a bottle. I will amplify that. If we could save, and we knew we could save, by purchasing a better product from a more reliable manufacturer, we could well afford to pay 7½ cents a bottle, because we were going [310] to make 22 cents more on every bottle of tablets sold. I had in mind that these payments were to be made on any product that we sold, and I call your attention to this: "Whether sold under the trade mark, 'The Stuart Formula,' or not"—in other words, no matter what The Stuart Company sold, no matter what they called it, we still had to pay the 7½ cents a bottle. As the potencies were increasing, we made larger payments up to 12½ cents. I also had in mind this——

The Court: Would potencies increase the sale price, that is, the amount The Stuart Company could get?

The Witness: No, your Honor.

The Court: It wouldn't?

The Witness: It's very easy to explain. We were selling at \$2.30 then, and the product today has been improved so that it would probably have to sell for \$5.00 a bottle—added more of the vitamins. I can't give you the quantities.

The Court: That is what I asked you. If you sold something that had an increased potency, wouldn't it sell for more on the market?

The Witness: Well, it didn't, your Honor, be-

(Testimony of Robert H. Dunlap.)

cause the prices of these products came down. May I finish?

Mr. Mackay: Yes.

The Witness: You asked me what I had in mind in writing paragraph 4. I would like to state this: that the payments were divided into three sections; the first one was a [311] cash payment, the next a note signed by The Stuart Company and Mr. Hanisch, and the third was a Stuart Company obligation alone.

Q. (By Mr. Mackay): You mean with respect to the \$122,700.00?

A. Yes, that is correct. Mr. Hanisch actually that night signed a note for \$40,000.00 payable to the Vita-Food Corporation.

Q. Now, do you remember when that contract was signed?

A. Ten minutes after 6:00 on the morning of November 28th.

Q. When was the contract drafted?

A. During the whole night?

Q. Was Mr. Wiseman present?

A. He was.

Q. Who else?

A. Mr. Hanisch. Mr. Hanisch joined us shortly after midnight.

Mr. Mackay: If your Honor please, I should like to offer in evidence the exhibit identified as Exhibit 13—12, I mean.

Mr. Maiden: No objection. You are now putting this in evidence?

(Testimony of Robert H. Dunlap.)

Mr. Mackay: The original in place of the other.

The Court: Received as Exhibit 12.

The Clerk: Exhibit 12. [312]

(The document heretofore marked Petitioner's Exhibit No. 12 was received in evidence.)

Mr. Mackay: Will you take the witness. [313]

Cross-Examination

By Mr. Maiden:

Q. Are you still connected with The Stuart Company? A. Yes, sir.

Q. Are you its attorney? A. Yes, sir.

Q. Are you an officer of the company?

A. I am.

Q. Do you draw any compensation from The Stuart Company as an officer? A. No, sir.

Q. You never have? A. No.

Q. You are on a retainer fee basis as that attorney?

A. No, I have arrangements on a per diem basis.

Q. I guess that would cover your participation in the trial of this case?

A. That is correct. I expect to paid on a per diem basis for my appearance here.

Q. Now, Mr. Dunlap, there has been some testimony here about the discussion of the contract of May 5, 1941, Exhibit 8. A. Yes, sir.

Q. Did you draft any part of that agreement?

A. No. I would like to explain. An agreement

(Testimony of Robert H. Dunlap.)

was presented to me about the 24th, on the 24th of April, 1941. I [314] didn't like it. I redrafted the agreement, turned it over to Mr. Hanisch, and he in turn turned it over to Mr. Lewis. Mr. Lewis, in my presence, said he would not accept any of my suggestions. This was going to be the contract or else there would be no deal.

Q. Well, then, what occurred?

A. What occurred?

Q. Yes, after he rejected your draft, then was this draft drawn?

A. Yes, sir; drawn by Mr. Overton, so I was told by Mr. Lewis. [315]

Q. In other words, there is no language in this agreement that originated with you?

A. I don't know. They might have accepted from my other draft. I haven't checked it with the draft I prepared. Something with reference to an arbitration clause. They might have accepted some of that.

Q. Was it your idea of inserting in the agreement this arbitration arrangement, Mr. Dunlap?

A. I don't know whether I suggested it or Mr. Hanisch suggested it. I don't like it. Probably he did. I don't like arbitration agreements; don't think they mean anything in this——

Q. You read over the agreement, though, I presume?

A. Yes, sir.

Q. And did you think you understood the agreement at the time, the agreement when you read it over?

A. Yes, I did.

(Testimony of Robert H. Dunlap.)

Q. Well, I am going to ask you to read Paragraph Second of this agreement and tell me what you understood that to mean at the time it was written.

A. I understood it to mean that the Stuart Company recognized that the Vita-Food Corporation owned the trademark, The Stuart Formula.

The Court: Paragraph 2 or Paragraph—

Mr. Maiden: It is Paragraph 2 on page 3, your Honor. [316]

The Witness: Paragraph 10. I understood the parties intended—that the Vita-Food Corporation should own the trademark. At that time I did not profess anything.

Q. (By Mr. Maiden): You mean since that time you have become an expert in the field of trademark law?

A. Well, I hate to call myself an expert. I have done considerable work in connection with trademarks for this and other companies.

Q. But since that time?

A. That is right.

Q. Now, Mr. Dunlap, you stated that The Stuart Company was anxious to get out from under this contract. A. Certainly.

Q. When did that desire come to The Stuart Company first?

A. On October 1, 1942, when for the first time Mr. Hanisch obtained definite information he could buy the pills and the goo, as we call it, on—for 30

(Testimony of Robert H. Dunlap.)

cents a bottle less than we were paying, two-thirds of the cost.

Q. In other words, your desire to get out from under this contract came over you when you found out that you could buy this vitamin concentrate at cheaper prices and that occurred in October of 1942?

A. That is right. [317]

Q. Prior to that time you had had no such desire to get out of the contract?

A. Oh, I didn't like the contract.

Q. That doesn't answer my question, Mr. Dunlap.

A. I would say that—yes, get out of the contract. That was a 10-year deal. We continued to believe until about the middle of June, I am answering your question, 1941, that these representations about humanitarianism—there was really something to them. In June of 1942 Mr. Lewis and Mr. Harnisch had conferred and I knew about it because I think I talked to Mr. Lewis on one of those occasions, concerning a modification of the agreement to reduce the quotas and make it so that they could provide some semblance of fairness to the relationship between the parties.

Now, I can say there was a desire to produce a modification of the agreement as early as June, 1942.

Q. Now, just as much as we can—now, I appreciate your extreme interest in this case, but just as much as we can, please try to answer my questions as directly as you know you should answer them.

A. All right.

(Testimony of Robert H. Dunlap.)

Q. Then if there is anything that Mr. Mackay wants to straighten out, of course, he will have an opportunity on redirect examination, and I would appreciate that courtesy from you. [318]

Now, Mr. Dunlap, I believe you heard Mr. Harnisch state on direct examination that he didn't consider the stock of The Stuart Company to be worth anything. A. On November 28, 1942?

Q. And at any time during 1942. Did you hear him make that statement on direct examination?

A. I did.

Q. Are you wholly in agreement with that statement? A. In 1942, I am.

Q. Were you in agreement with a statement that this stock had no value as of July 31, 1942?

A. The stock of The Stuart Company had no value as of July 31, 1942?

Q. Yes.

A. Marketwise, it had no value. As a matter of fact, the Commissioner of Corporations didn't think it was worth one dollar a share.

Q. I believe, however, that a letter you wrote to the Corporation Commissioner, Mr. Dunlap—in that letter you represented to the Corporation Commissioner that that stock was considered to be valuable security. Now, in view of your previous statements, was the statement to the Corporation Commissioner a misrepresentation of facts on your part, deliberate or unintentional?

The Court: What exhibit is that? [319]

(Testimony of Robert H. Dunlap.)

Mr. Maiden: That is Exhibit, Respondent's Exhibit C.

Q. (By Mr. Maiden): I will call your attention to the next to the last paragraph on the second page of that letter, and I will ask you to read that.

A. "You should be informed that all the stockholders of The Stuart Company have agreed between themselves by endorsement on the stock certificates that they will not sell or offer to sell their stock to any person outside the present stockholders without first offering the same to such present stockholders. You are further informed that none of the stockholders has any present intention of disposing of what they all believe to be a valuable security."

Q. Now, will you answer the question.

A. With Mr. Hanisch in the company, I think any company Mr. Hanisch is connected with is going to be a success. He has proved that.

Q. Well, you haven't answered my question.

You just stated that you agreed with Mr. Hanisch's testimony—that this stock didn't have any value.

A. I do.

Q. And now you come along and you are shown a letter wherein you represented to the Corporation Commissioner that this was considered to be a valuable security. [320]

A. They believed it to be a valuable security if Mr. Hanisch continued with the company, devoted his efforts to it and took no salary, which he was not taking and didn't take until last November.

(Testimony of Robert H. Dunlap.)

Q. Why, then, did Mr. Hanisch consider and why did you consider that the stock had no value as of July 31, 1942, if you knew Mr. Hanisch was going to continue to operate the company and it would be successful?

A. Well, the Corporation—may I have that question?

(The question was read.)

Mr. Mackay: Read that question again, please.

(The question was read.)

The Witness: As of July 31, 1942, the company was in debt to Mr. Hanisch in the sum of some sixty thousand dollars, or thereabouts. I don't remember the month. If he were not in the position of advancing additional funds to the corporation and willing to do so, to pay the detail men to keep the thing going, we would have a lot of merchandise which nobody would want. It was Mr. Hanisch's willingness to continue to advance money to the corporation so that they could expand their operation, get the new customers——

Q. (By Mr. Maiden): Now, would you re-read my question?

(The question was read.)

Mr. Maiden: Now, I will ask Mr. Dunlap to answer. [321]

Q. (By Mr. Maiden): Now, you had just stated that the statement made to the Corporation Commissioner was based upon your knowledge that Mr. Hanisch was going to stay with the business and

(Testimony of Robert H. Dunlap.)

any business would be successful—that is, if Mr. Hanisch were connected with the business.

Now, I want you to answer my question.

A. I don't care to argue with you on this thing.

Q. Very well.

A. You say why did I consider—let's have it again.

(The question was re-read.)

The Witness: All right. I will answer not as to what Mr. Hanisch believed. I will answer as to why I believed it. I had seen the financial statement of the company. I had talked to Mr. Willis Brown and I knew that if they were making a profit, they were making a very small profit and that in the future the security probably would be valuable if Mr. Hanisch stayed with the company. I did not think that it had any value in dollars and cents except nominal at that time.

Q. (By Mr. Maiden): Why didn't you tell the Corporation Commissioner that in applying for this application to issue additional stock?

A. I did tell him that. I showed the financial statement to him and he came back and said, "I am not going to give you [322] a permit to merge these companies and issue new stock, because your earning statement shows the stock isn't worth anything."

Q. As a matter of fact, isn't it a fact that you issued a revised financial statement, showing a profit by the corporation?

(Testimony of Robert H. Dunlap.)

A. I have it right here. I would like to take a look at it.

The Court: Who is Mr. Willis Brown?

The Witness: Mr. Willis Brown was a certified public accountant who was then doing the office work of the company.

This statement of estimated profits of \$4,672.00, an estimated profit, that was Mr. Brown's estimate.

Mr. Mackay: What period?

The Witness: This was statement of August 3, 1942. I did not know at the time that he had not accrued interest and he had not accrued a lot of expenses.

Q. (By Mr. Maiden): Otherwise, in other words, you now claim that you were under a misapprehension of facts as to the financial condition of The Stuart Company when you gave assurance to the Corporation Commissioner that "you are further informed that none of the stockholders have any present intention of disposing of what they all believe to be a valuable security"? [323]

A. You say I was laboring under a misapprehension?

Q. It that what you are now claiming, that you were laboring under a misapprehension when you represented to the Corporation Commissioner that the stockholders believed this was a valuable security?

A. I was laboring under no misapprehension when I said they did not intend to sell it. They didn't. I was laboring under a misapprehension as

(Testimony of Robert H. Dunlap.)

to the earnings of the company in that immediately preceding period because, as a matter of fact, instead of making earnings, they made a loss.

Q. Now, Mr. Dunlap, you prepared the application that was filed with the Corporation Commissioner?

A. I did.

Q. And you set out certain allegations in that application?

A. You want to see it?

Q. Just answer the question.

A. Yes, I did.

Q. You were asking that the Corporation Commissioner waive the requirements that the additional stock be put in a scroll?

A. That is right.

Q. In order to obtain the freedom of the stock, you were trying to convince the Corporation Commissioner that The Stuart Company was at that time on a profitable basis; [324] isn't that right?

A. That is right.

Q. And you obtained or had an accountant obtain a financial statement which you submitted in support of your application, isn't that correct?

A. That's correct.

Q. Now, then, do you mean that you accepted this financial statement from this C.P.A. as being a true and accurate one without making any check or effort to verify it or anything?

A. Yes, certainly.

Q. Well, did you tell the Certified Public Accountant just what kind of a financial statement you wanted to show?

(Testimony of Robert H. Dunlap.)

A. I called him up and I said, "Can you get us a new statement?" Yes, I talked to him. I said, "What is the situation of the company; can you show a profit?"

He said, "No, I can show you a estimate that there is going to be an estimated profit." And that is what his statement shows, estimated profit.

Q. In other words, you called him up and asked him if he could show a profit? A. Right.

Q. And you were anxious to show to the Corporation Commissioner a profit regardless of whether or not, as a matter of fact, there had been a profit, is that right, Mr. Dunlap? [325]

A. That is not right. I did not intentionally make any misrepresentations to any court or public agency or anyone else, for that matter.

Q. Now, Mr. Dunlap, I call your attention to Respondent's Exhibit D, which is a letter written by Mr. Hanisch to the Corporation Commissioner in regard to this application, and in this letter Mr. Hanisch says, "Mr. Dunlap has informed me of his statement to you that the business of The Stuart Company is now on a profitable basis and has been for approximately 60 days last past. This is correct."

A. Well, it now develops that it now is not correct. That was based on this statement of Mr. Brown's.

Q. In other words, the situation has changed for time in making statements, is that correct?

A. Say that again.

(Testimony of Robert H. Dunlap.)

Q. The situation has changed with respect to time for making statements, is that correct?

Mr. Mackay: What do you mean?

Mr. Maiden: I will withdraw it.

The Witness: I don't understand.

Mr. Mackay: He will withdraw it. All right.

Q. (By Mr. Maiden): Now, Mr. Dunlap, as a matter of fact, on November 28, 1942, the only litigation then pending was the injunction suit brought against The Stuart Company by Vita-Food; [326] is that correct?

A. That is right, in which we about to appear and file an answer and a cross-complaint.

Q. Now, you added that on. That was not responsive. I want him to answer my questions and then he can make explanations. The fact remains that you did not file an answer to an injunction suit, isn't that correct? A. That is correct.

Q. Now, it further is a fact in this case that you had been apprised of filing of this injunction suit prior to November 28, 1941?

A. Two days before.

Q. I mean 1942. A. Two days before.

Q. And you had been served with the restraining order issued by the Superior Court prior to that time, is that correct?

A. I had not been served; the Stuart Company had.

Q. The Stuart Company had. Now then, what was the nature of that litigation? Will you tell the court?

(Testimony of Robert H. Dunlap.)

A. The nature of that litigation was to establish the allegation that The Stuart Company was bound to buy all of its products from the Vita-Food Corporation. The specific relief asked in that particular case was that The Stuart Company not be enjoined from selling any product purchased [327] from the other manufacturers under the trade name The Stuart Formula.

Q. Do you now admit to this Court that the only relief asked in this litigation was that The Stuart Company could be prohibited from using the trade name, the Stuart Formula, on any vitamin products which had not been manufactured by the Vita-Food?

A. I do not so admit. That is an equity case and in any equity case, the Court will render such decrees as the facts definitely merit on the [328] hearing.

Q. Within the scope of the prayer, is that correct?

A. No, sir, you are not limited in an equity case to the relief prayed for in California.

Q. Now, I want to know why it is that immediately after you were served with notice of that suit, that you contacted Mr. Wiseman and asked for a conference.

A. I did not contact him, he contacted me. I will tell you exactly what happened. Mr. Wiseman called me up and he said that he would like to have—"I placed some orders with these orders, and aren't

(Testimony of Robert H. Dunlap.)

they going to reply to the orders?" I called Mr. Wiseman and I said, "What about the orders that you have been paid for and have not yet delivered?"

We had actually, they had \$2300.00 of our money which we had paid them for orders theretofore placed. In the course of that conversation which was on the afternoon of the 27th of November, he said, "I will see you this evening and you can give me the check—" Wait a minute—"You can give me the payment for the balance and we will make delivery of the orders."

I met him at the Vista Del Rey Hotel that evening, and within five minutes after we met—6:00 o'clock, November 27th, he said, "Isn't there some basis of getting together and settling this?"

He contacted me. I did not contact him with reference to [329] the settlement.

Q. You would not have contacted him? Is that right?

A. Absolutely not. I was prepared to recast the complaint which has been marked for identification as Exhibit 16 as a cross-complaint.

Q. In other words, if Mr. Wiseman had not solicited an effort to settle the case, you would have gone ahead with the litigation that you say you had in mind bringing, is that correct?

A. Why certainly. Our settlement negotiations had broken down on the 22nd.

Q. You were going to go ahead, then, and file a complaint in court and undertake to rescind the

(Testimony of Robert H. Dunlap.)

contract of May 5, 1941, upon the ground of fraud and other allegations? A. That is right.

Q. I mean, had it not been for the fact that Mr. Wiseman suggested you ought to reach a settlement?

A. That is right, because we had been through the settlement conferences before. We thought we had arrived at a settlement on the afternoon of November 22nd. The next morning Mr. Wiseman called me up and said the deal was off.

Q. So then you now represent to the court that notwithstanding your prior testimony to the effect that the Stuart Company did not want to have to litigate that contract of May 5, 1941, because it would involve ruining the good name and business of the Stuart Company, you would not have sought to [330] reach any settlement short of litigation with Mr. Wiseman and the Vita-Food Corporation?

A. We had passed that bridge. I told you that we had made an effort to settle, and I saw Mr. Wiseman on the 18th, 20th and 22nd. The settlement negotiations had broken down. We had tried to settle. We didn't want to litigate up to that time. When we saw that the settlement negotiations had broken down, we were then prepared to go ahead.

Q. I am going to ask you this, Mr. Dunlap, and I want a frank, straight forward answer. Suppose you had filed an answer to this injunction suit in which you set up that you had the right to use the trade name, "The Stuart Formula," that you owned it as opposed to the Vita-Food Corporation

(Testimony of Robert H. Dunlap.)

and you had gone into the trial of a lawsuit involving the ownership of this formula, which is the subject matter of this suit, will you please tell the Court how the trial of a case of that nature would have involved proof of matters which would have ruined Stuart Company's business as you suggested in your direct examination?

A. We did not—we were not interested, except incidentally.

Q. I want you to answer that specific question, Mr. Dunlap.

A. You are assuming something that just is not true. You are assuming—— [331]

Mr. Mackay: Well, may we have the question?

The Court: Are you going to answer the question or argue with counsel?

Mr. Mackay: Will you read the question?

(The question was read.)

Mr. Mackay: If your Honor please, I would like to make this observation. He speaks about this suit. First he starts out talking about a complaint, and then this suit. Now, do you mean the present controversy we have here or what do you mean? It is so involved.

Mr. Maiden: You know very well what I am talking about, I am talking about this injunction suit filed by the Vita-Food Corporation against the Stuart Company.

Mr. Mackay: I am complaining then about the unclearness of the question, because as I understood it——

(Testimony of Robert H. Dunlap.)

The Court: Well, is it a hypothetical question or was the cause of action in the Vita-Food Company complaint devoted only to the question of the ownership of the trademark? Is your question hypothetical or is your question based upon some actual complaint?

Mr. Maiden: It is based upon the actual complaint and upon actual facts of the complaint.

The Court: What does the complaint set out to do? What exhibit is that?

Mr. Maiden: This is Exhibit No. 15, Petitioner's [332] Exhibit No. 15.

The Court: It seems that you can best explain your question by referring to Exhibit 15, is that true?

Mr. Maiden: Well, your Honor, it might involve reading the whole thing, and I don't want to take that time. The substance, the whole substance and the only substance of the suit is contained in the prayer for relief.

The Court: What is the prayer for relief?

Mr. Maiden: (Reading):

"Wherefore, plaintiff respectfully prays for judgment against said defendants, their officers, agents and employees, that they and each of them be permanently enjoined from using or attempting to use the trademark of plaintiff, 'The Stuart Formula' upon any product not manufactured by plaintiff, and not furnished to the said defendants and any of them by

(Testimony of Robert H. Dunlap.)

plaintiff, and from doing any of the acts or any of the things above mentioned."

The Court: The plaintiff there being the Vita-Food Corporation?

Mr. Maiden: The plaintiff being Vita-Food Corporation.

The Court: Your question is, if I can paraphrase it, Mr. Maiden, whether the defense of that kind of a cause and complaint would necessitate presenting any facts that [333] would be detrimental to the conduct of the business of the Stuart Company?

Mr. Maiden: That was my question, your Honor.

Mr. Mackay: If the question is so understood that way, I don't think I should have any objection to it.

The Court: Is that your question?

Mr. Maiden: That is my question stated succinctly and clearly.

The Witness: No, with this explanation: On the assumption that my answer would simply raise the question of our ownership.

Q. (By Mr. Maiden): Well, you stated that you wanted to keep down any litigation, any actual litigation. That would bring out the fact which you claim that the Stuart Company had been selling an inferior and a fraudulent product on the market, so why then would you have in answer to that suit alleged facts and things which would require proof of things which would destroy the business of the Stuart Company?

(Testimony of Robert H. Dunlap.)

A. Why would I do it?

Q. Yes.

A. Because I wanted to destroy the obligation of the Stuart Company to buy from Vita-Food, that is why, and I was prepared to shoot the works—if you will pardon the expression—to do just that. We had made an effort to [334] settle the case—not to settle the case, to settle the disputes between the parties and get a cancellation of the agreement. We had made an effort, and that had broken down.

Q. When did that effort commence?

A. On the 18th day—my first conference with Mr. Wiseman was on the 18th of November. I had my next one November 20th, and the final one November 22nd. We were unable to effect a cancellation of the agreement at that time. We were all through. We were faced with the situation of having to get out of the obligation to buy from the Vita-Food Company, and we were prepared to litigate that matter.

Q. Now, I want to know, Mr. Dunlap, why it is that you didn't actually file in court this so-called complaint that you state that you drafted prior to that time. Why didn't you actually file it?

A. Because two days after they—they jumped the gun on me and we settled our disputes.

Q. Now, will you tell me why it is that you settled that dispute within two days, and why you found it necessary to stay up all night long in order to complete that agreement?

A. I will be very glad to.

(Testimony of Robert H. Dunlap.)

Q. Do so.

A. On the afternoon of November 22nd, Mr. Wiseman and Mr. Hanisch agreed on a settlement. The next day Mr. Wiseman called up and said he wasn't going to go through [335] with it.

I said to Mr. Wiseman at the Hotel Vista Del Rey on the evening of November 6th, I said, "Look——"

Q. No. Wait a minute. I don't care——

A. November 27th, I said to him, "Look, Mr. Wiseman—Oscar," I said, "Look, Oscar, this time we are going to stay with it until we either settle or don't settle if it takes all night."

That is why we stayed with it, because I didn't want him to change his mind again.

Q. Didn't you think that if you held off a little while longer and you actually filed this suit and brought your arms out into the open, that maybe you might get a better settlement out of him?

A. No, I did not.

Q. Thank you, that is the best answer I have had this morning.

Mr. Mackay: You don't like his answer.

Q. (By Mr. Maiden): Now, Mr. Dunlap, at the time of the agreement of November 28th, 1942, cancellation notices had been served upon both of the parties, that is, a cancellation notice had been served on the Stuart Company revoking their exclusive right, and the Stuart Company had acknowledged receipt of that notice and had stated that they considered it cancelled [336] for all purposes, and

(Testimony of Robert H. Dunlap.)

that they would not recognize an effort to reinstate the contract? A. That is right.

Q. Now, why didn't you wait until the 60 days expired which would put those cancellation notices into effect to find out whether or not Vita-Food Corporation intended to try to hold to a one-sided contract before you settled the case?

A. For this reason: This complaint, Exhibit 15, alleges that we still have to buy our product from the Vita-Food Corporation. They——

Q. It says——

Mr. Mackay: Let him answer.

The Witness: I want to read it to you—why didn't I wait for the 60 days? Because the Vita-Food Corporation contended that the contract was still in effect in this very litigation.

The Court: Well now, this whole trouble is about chronology. I think that would help a little bit. What is the date of the notice?

The Witness: October 8, 1942.

The Court: From Vita-Food?

The Witness: October 8th.

The Court: What is the date of the filing of their complaint? [337]

The Witness: November 25, 1942. That is before the 60 days had expired.

The Court: 60 days from October 8th would have been December 8th or 9th?

The Witness: That is correct.

The Court: So Vita-Food filed a complaint before the 60 days had expired?

(Testimony of Robert H. Dunlap.)

The Witness: Exactly.

The Court: Is that what you want to say?

The Witness: And this: In that complaint they said that the contract was still in effect.

Q. (By Mr. Maiden): Now, I want you to show me in this petition, and I want to do it if you have to read every word of it, show me in here in this injunction contention wherein they actually allege that you have to buy—that is, where the Stuart Company had to buy all of its products from Vita-Food.

A. I will be happy to. Page 5 of Exhibit 15, line 14.

The Court: Read it.

The Witness: (Reading):

“First Parties shall handle no other products than those manufactured or produced by Second Party, and shall be the sole distributor of all products manufactured or produced by Second Party, except as herein otherwise [338] provided.”

The Court: What is the whole text, then? Are they quoting from the agreement?

The Witness: Quoting from the contract, that is correct.

The Court: That isn't very clear. Why do you think that quoting from the contract means that they were asking the Court to sort of mandamus you to continue to operate under the contract?

(Testimony of Robert H. Dunlap.)

The Witness: Your Honor, this is an injunction case.

The Court: Well, I know it is an injunction case. An injunction case would be the opposite in the way of a mandamus proceeding.

The Witness: Exactly, but in an injunction proceeding it is true that at the time of the filing of the complaint, the only remedy they inserted was that we could not use the trademark, "The Stuart Formula," but in the California equity practice, the Court will mould its decree to cover the relief to award the relief which is appropriate under the evidence adduced.

The Court: Yes, but then up to that time Vita-Food Corporation had not asked the Court in any bill of complaint to order the Stuart Company to continue to operate under the contract, under the provision that the Stuart Company would have to buy all of the things it sold from Vita-Food, had it? [339]

The Witness: That is correct, your Honor.

Q. (By Mr. Maiden): In other words, the suit did not undertake to have the Court restrain the Stuart Company from purchasing vitamin products from other sources, did it?

A. That is correct.

Q. Now, then, after this injunction suit was brought against you and you saw the type of relief that it asked for, and that it didn't undertake to restrain the Stuart Company from purchasing vitamins from any other source, why did you enter into

(Testimony of Robert H. Dunlap.)

this settlement agreement until you found out whether or not the Stuart Company was going to actually take any such action as that against you?

A. You mean the Stuart Company or the Vita-Food Company?

Q. That the Vita-Food Company would take against the Stuart Company.

A. Well, I think, Mr. Maiden, that if you will read this Exhibit 15, you will find that they were—it was in this contract, in this Exhibit 15—the allegations which clearly indicated to me that they did intend to hold us to our contract.

Q. They weren't doing it in the suit they filed, they were asking for only one relief.

A. In the prayer—— [340]

Q. Just a minute, and that was to enjoin you from using the trademark "The Stuart Formula" on vitamin products which you had not purchased from Vita-Food Corporation.

A. In the prayer, that is correct.

Q. Now, wouldn't that indicate to you that the Vita-Food Corporation had no intention or undertaking to try to force you to purchase all of your products from them? A. It did not.

Q. It didn't carry that connotation in the relief?

A. It did not. In fact, quite the contrary.

Q. Well, now——

The Court: Mr. Mackay, do you want to interpose an objection?

Mr. Mackay: I don't want to interrupt, if your Honor please, but if your Honor will read the ex-

(Testimony of Robert H. Dunlap.)

hibit, the letter of October 8, 1942, which is attached as part of the complaint, that specifically says that they want to cancel only part of the contract, but the rest to remain in effect. It seems to me that if you will read the complaint, the whole thing there together, that you can see what they are after there, and it is part of the complaint, and I think the witness' attention should be directed to that.

Mr. Maiden: Now, if the Court please, regardless of what they said in the letter of cancellation of October 8, 1942, when they came to file their litigation in court [341] with The Stuart Company, there is no effort made to enforce that contract. The only thing is to enjoin these people from pirating their trade name.

Mr. Mackay: Mr. Maiden, isn't that letter there which attempts to cancel only part of the contract? Isn't that made a part of the complaint? That is what I am trying to say.

Mr. Maiden: That is true, the letter of October 8th—

Mr. Mackay: Why can't we look at the whole complaint?

Mr. Maiden: I don't think we need to look any further than the four corners of the allegation contained in the complaint, and the specific relief asked for.

Mr. Mackay: Well, if you want to ignore all the exhibits and the equity rules in California, it is all right with me. [342]

Q. (By Mr. Maiden): Now, Mr. Dunlap, did

(Testimony of Robert H. Dunlap.)

you think you had a good cause of action against the Vita-Food Corporation?

A. I thought I had a fine—I had three fine causes of action against the company.

Q. Will you tell us of those causes of action?

A. May I look at Exhibit 16 for identification? I think counsel has a copy there.

Mr. Mackay: Yes.

The Witness: The first cause of action was for fraud in inducing the execution of the contract; the second cause of action was for failure of consideration, and the third cause of action was for a declaration of rights and duties under our declaratory judgment statute.

Now, do you want me to go through and explain what that cause of action was?

Q. (By Mr. Maiden): No, I don't. That is sufficient.

Now, when did you become convinced that you had this splendid cause of action against Vita-Food Corporation?

A. The 10th of October, 1942.

Q. The 10th of October, 1942?

A. Right. Do you want to know why I remember that date?

Q. Well, you can if you want to, I have got no objection. [343]

A. I mean, I don't want to answer it unless——

Q. Well, I mean, if it has some particular bearing on the subject.

A. It is the day that I met Mr. Strate, and Mr.

(Testimony of Robert H. Dunlap.)

Strate explained to me that there just wasn't any such thing as a method of compounding in a molasses base oil-soluble vitamins A and B with water-soluble members of the B-complex, and also that the price that we were paying to Mr. Lewis was too high by more than 30 cents a bottle.

The Court: Who is Mr. Strate?

The Witness: Mr. Strate is vice-president and sales manager of Strong-Cobb & Company, who had called on Mr. Hanisch.

Q. (By Mr. Maiden): Now, then, upon the basis of the information that this alleged man told you——

A. This what?

Q. ——you reached an opinion, a legal opinion as a lawyer, that you had an excellent cause of action against the Vita-Food Corporation and that you could successfully set aside this contract of May 5, 1941, is that right?

A. Right.

Q. You were cocksure about that, Mr. Dunlap?

A. Yes, I was.

Q. But the fact still remains that you never filed any such suit? [344]

A. That is right.

Q. The fact remains that you—that the Stuart Company paid the Vita-Food Corporation \$197,700.00 to get out of the contract, according to your interpretation, is that right?

A. Not according to my interpretation, that is what they paid us for it. I know, I was one of the parties.

Q. You were one of the parties. Now, Mr. Dunlap, you weren't interested in obtaining title to

(Testimony of Robert H. Dunlap.)

“The Stuart Formula,” I believe. That has been the tenor of the testimony throughout the case, is that right? A. We already owned it.

Q. Oh, you already owned it?

A. That is right.

Q. How can you make that statement in good faith to this Court, Mr. Dunlap, when you set forth specifically in the agreement of May 5, 1941, that the Vita-Food Corporation did own and should own this trade name?

A. I can make that statement in perfectly good faith, and I don't want you challenging my good faith, Mr. Maiden. If I sign a contract with you in which I say that you are my father, that doesn't make you my father, and that is exactly the kind of a statement that Exhibit 8 is. In other words, it was entirely a void provision in the agreement, it was of no effect whatsoever. You cannot transfer or create ownership of a trade-mark in that [345] way.

Q. Now, for purposes of this case, I am going to ask you if you have ever seen this document here which is headed, “State of California, Department of State,” in which it is set forth that this trade-mark has been registered in the name of and is the property of Vita-Food Corporation, dated the 23rd day of June, 1942. A. Certainly.

Q. I will ask you if that is prima facie evidence of ownership in Vita-Food Corporation under California law? A. It is.

The Court: May I look at that? Is that an exhibit attached to the complaint?

(Testimony of Robert H. Dunlap.)

Mr. Maiden: It is attached to the complaint, No. 15.

The Court: Exhibit No. 15?

Mr. Maiden: Mr. Mackay, you will stipulate with me that this is a correct copy of the certificate?

Mr. Mackay: Yes, indeed. It is in evidence, and I wouldn't let it go in unless I knew it was good.

The Court: What is this, Mr. Dunlap, this exhibit? It is a certificate from the Secretary of State of California, and purports to certify that Vita-Food Corporation made a claim for a trade-mark?

The Witness: That is right. Under California law, your Honor, we have a provision for registering a trade-mark with the Secretary of State. [346]

The Court: Is that something rather unique to the State of California?

The Witness: No, it isn't. We have a little bit more comprehensive provision than many States. Some States don't have any provision for the registration of a trade-mark.

The Court: Well, you see, we get into these special fields, all of us. Let me ask you this question for my general information: Where does the area of state law regulating the use of a trade-mark end and where does the area of federal regulation begin?

The Witness: When you start shipping in interstate commerce it is federal.

The Court: Oh, if you are disposing of your product solely in intrastate commerce, you are con-

(Testimony of Robert H. Dunlap.)

trolled by the state law, and the States have their own copyright and trade-mark statutes, do they?

The Witness: Not copyright, usually.

The Court: No copyright?

The Witness: Not copyright, usually.

The Court: But trade-mark?

The Witness: A minority of the States—I mean, I wouldn't want to say whether it is a minority or a majority that do have trade-mark laws which are applicable to the States.

Q. (By Mr. Maiden): Now, Mr. Dunlap, I call your attention to a document [347] in Exhibit 15, which purports to be a photostatic copy of a certificate of registration issued by the Commissioner of Patents of the United States of America, which states that, "Upon due examination, it appearing that the said applicant is entitled to have his trade-mark registered under the Act of May 19, 1920, the said trade-mark has been duly registered this day in the United States Patent Office to the Vita-Food Corporation, its successors or assigns."

That is dated the 8th day of September, 1942.

A. Right.

Q. Now, would you say that that is evidence, prima facie evidence, of the Vita-Food's ownership of this trade-mark?

A. Prima facie evidence, yes.

Q. Now, Mr. Dunlap, how much did The Stuart Company pay Vita-Food for their title to this trade-mark?

A. Nothing.

Q. Nothing. That didn't involve any of the con-

(Testimony of Robert H. Dunlap.)

sideration in the agreement of November 28, 1942?

A. No, we were interested in getting freedom from the provisions of that contract. The trade-mark was an incidental something.

Q. Now, I believe you stated something about an abandonment clause being put in there at the suggestion of Mr. Wiseman? A. Yes, I did.

Q. Who stated that the Stuart Company was going to [348] abandon that formula?

A. He was afraid we might. We had not stated that we were going to. I will say this: We had told him that we were prepared to use a new name.

Q. In other words, that you were going to abandon the "Stuart Formula" name, that you were contemplating the adoption of a new name?

A. That is correct. We told him we had already started the art work on a new name.

Q. Now, did you show him the new art work that you had commenced on the new name?

A. I said we had started on it. No, we didn't have that with us, they were just rough drawings at the time. I don't know whether any actual drawings had been made, but orders had been placed, as I recall it.

Q. But the fact is that The Stuart Company did not abandon that trade-mark, isn't that correct?

A. That is correct, it did not abandon it; no.

Q. And the fact is that The Stuart Company continued to and does to this day use that trade-mark? A. That is right.

Q. Now, Mr. Dunlap, the fact is that you knew

(Testimony of Robert H. Dunlap.)

at the time of the conferences which culminated in the November 21, 1942, agreement, that you had no intention of either abandoning the "Stuart Formula" name—— [349]

A. The fact is quite the contrary.

Q. Well, why didn't you abandon it, Mr. Dunlap?

A. I am one of the directors of the company, and the decision to do that—that end of the thing, I am guided by what Mr. Hanisch decides.

Q. In other words, you were for abandoning it, is that correct?

A. Why, I didn't care one way or the other.

Q. If you had been selling such a fraudulent, inferior article on the market for nearly two years under the name, "The Stuart Formula," didn't it occur to you that possibly the name, "The Stuart Formula," would be detrimental to your business if you continued to use it?

A. Very definitely.

Q. Well, why did you continue to use it, then?

A. We had a lot of labels on hand, we had a lot of the stuff that we had paid for. After all, you don't throw away \$50,000.00 or \$60,000.00 if there is a chance to get it back.

Q. Well, all right, then. When you used up the supply on hand, why did you order some more?

A. Those decisions were made by Mr. Hanisch.

Q. Now, since that agreement of November 28, 1942, sets out that the parties desire to settle this litigation, which refers to this injunction suit, how

(Testimony of Robert H. Dunlap.)

much of the consideration was made for the settlement of that injunction suit? [350]

A. I didn't set down and pay—and add any figures. We were settling the whole matter, we were getting rid of the litigation, the expense of that. We were getting out of the contract. We were settling all our disputes. I didn't count them.

Q. In other words, you tell the Court that some part of that consideration was for the purpose of settling this injunction suit, is that correct?

A. Yes.

Q. But you are unable to tell the Court how much of it was in consideration for that?

A. I would say that, yes. I figured that it would take \$5,000.00 to \$6,000.00 to try the case.

Q. In other words, you were giving the settlement of the litigation just a nuisance value in that consideration, is that right?

A. Well, it would be a hard-fought lawsuit. I would say \$5,000.00 to \$6,000.00. I think that was a little more than nuisance value.

Q. So that, then, with \$5,000.00 or \$6,000.00 taken off of \$197,700.00, we have got about \$192,000.00 that you were paying solely and absolutely for the cancellation of the May 5th contract, is that right?

A. That is right. May I state how I arrived at that statement? [351]

Q. You may if you wish to, Mr. Dunlap.

A. If we had been purchasing from the William T. Thompson Company from the beginning of our

(Testimony of Robert H. Dunlap.)

operation in The Stuart Company, we would have made \$99,000.00 profit——

Q. Now, I don't want an argument, Mr. Dunlap——

A. Up to the 28th of November, 1942. We knew that, and we were willing to pay the amount that we could make in two years to get out of the obligation to buy from Vita-Food.

Q. Now, you first stated that you didn't know what part of that consideration applied to the injunction suit, because you were settling over-all differences? A. Right.

Q. How did it happen to finally occur to you that possibly \$5,000.00 or \$6,000.00 did relate to the settlement of the injunction suit?

A. As a result of your question here today.

Q. Did the thought creep into your mind that maybe any admission that you made with respect to this consideration being applicable to the settlement of this injunction suit would not be a proper expense deduction but would be considered as a cost of obtaining a capital asset; the trade-mark?

A. May I have that again, please?

The Court: Read the question.

(The question was read.)

The Witness: As I understand it, Mr. Maiden, payments [352] in settlement of litigation are ordinary expenses.

Q. (By Mr. Maiden): But payments made to quiet or perfect title in a trade-mark would be a different thing, wouldn't they, Mr. Dunlap?

(Testimony of Robert H. Dunlap.)

A. That is perfectly true, that is perfectly true.

Q. They would not be deductible expenses?

A. That is correct.

Q. Now, Mr. Dunlap, I am just wondering whether or not, as a fact, you were tax-conscious of that transaction to The Stuart Company in the acquiring of this trade-mark in the agreement of November 28, 1942.

Mr. Mackay: If your Honor please, I will admit that this is a smart lawyer, Mr. Hanisch is a smart businessman, and that they were conscious of the Internal Revenue laws and are presumed to know them, and they did know something about income tax.

Mr. Maiden: Well, I don't accept the stipulation. I want the answer from the witness.

Mr. Mackay: I am trying to help out and save time.

Mr. Maiden: Well, I appreciate that, Mr. Mackay.

The Witness: Yes, I was conscious of that.

Q. (By Mr. Maiden): And I will ask you if you weren't trying to so write that agreement of November 28, 1942, to establish for the [353] Stuart Company, in the event of questioning by the Government, that The Stuart Company was simply paying some money to cancel an onerous contract and was not actually paying any money for the acquisition of a trade-mark?

Mr. Mackay: If your Honor please, I think he is going far afield. This Court has got to determine

(Testimony of Robert H. Dunlap.)

from the facts here whether this is a capital expenditure or whether it is a deductible expense.

Mr. Maiden: Well, the tax motive reflects upon those things. What we are concerned with here is the bona fides of this contract. We are not bound——

Mr. Mackay: Are you questioning that the contract is not bona fide?

Mr. Maiden: No, I am saying that we are concerned here not with the nomenclature that the parties have used, but we are concerned with the substance.

Mr. Mackay: Mr. Maiden, do you mean to tell me that the Commissioner of Internal Revenue, who has based his assessment on this contract which he speaks about as an agreement for the settlement of litigation and cancellation of a contract, is now trying to tell this Court that that contract means something other than it says?

Mr. Maiden: I am trying to say that the true substance of that contract was the acquisition of a trade-mark and that the entire consideration was in payment solely for [354] that trade-mark, and that all these other contingents are spurious.

Mr. Mackay: Well, if you are contending, if your Honor please, that we could end it some other way so that Uncle Sam can grab more dollars, I will admit that we could have done it. We are up against this situation where there is a contract between the parties, and for the first time they say that it didn't mean what it says. I say that the question is incom-

(Testimony of Robert H. Dunlap.)

petent, irrelevant, and immaterial, and taking up too much time of the Court.

The Court: Well, the objection is overruled. You may answer the question.

Read the question and let Mr. Dunlap answer it.

(The question was read.)

The Witness: I will answer your question "Yes," with this qualification: I was writing up the actual agreement that we actually arrived at. We were not acquiring a capital asset, and I drew it in that way because we weren't acquiring it.

Q. (By Mr. Maiden): That is, of course, in your opinion? A. That was my intention.

Q. Of course, you have no interest in the outcome of this lawsuit, Mr. Dunlap, is that correct?

A. I wouldn't say that at all. I am interested, of [355] course, in the success of my client.

Mr. Maiden: If your Honor please, I would like to ask if we could recess for lunch at this time. I believe I can save the Court's time if we could have a recess to let me go over my notes, and I will just have a few questions to ask Mr. Dunlap.

The Court: I thought perhaps you would be about finished with your cross-examination and that we would recess for lunch after that.

We will recess now until 2:10.

(Whereupon, at 12:40 p.m., a recess was taken until 2:10 p.m. of the same day.) [356]

Afternoon Session—2:00 P.M.

The Court: You may proceed.

Whereupon,

ROBERT H. DUNLAP

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Maiden:

Q. Mr. Dunlap, I hand you here a letter dated April 15, 1943, addressed to Mr. Oscar Wiseman, and ask you if you will identify that as a letter written by you.

A. Yes, that is my signature. I sent it.

Mr. Mackay: May I see it?

Mr. Maiden: Yes.

The Witness: May I take another look at it? I want to see the P.S. on it. All right.

Mr. Maiden: I would like to offer this in evidence as Respondent's exhibit next in order.

Mr. Mackay: No objection.

Mr. Maiden: I might call the Court's attention to the contents of this exhibit. It is just one little paragraph. This is addressed to Mr. Wiseman on April 15, 1943, from Mr. Dunlap.

It said: [357]

(Testimony of Robert H. Dunlap.)

“Pursuant to the provisions of paragraph second of the Agreement between Vita-Food Corporation and the Stuart Company dated November 28, 1942, I am directed to request the execution of the enclosed Assignments of Trade-Marks.

“Extra copies of this are enclosed for your files.

“Your early attention to this request will be appreciated.”

There is a little postscript:

“Please let us have two executed copies.”

The Clerk: That will be marked Exhibit M.

The Court: Is there any objection?

(No response.)

The Court: Without objection, the letter is received as Exhibit M.

(The document above referred to was received in evidence and marked Respondent's Exhibit M.)

Q. (By Mr. Maiden): Mr. Dunlap, for the purposes of possibly refreshing your recollection, I will ask you if you will look at this and tell me whether or not you received assignments of these registration certificates from The Vita-Food Corporation on or about November 30, 1942.

A. I did not. The letter was dated April 15, 1943. [358] We waited five months to ask for an

(Testimony of Robert H. Dunlap.)

assignment. What you have shown me is a copy of the receipt for the original registration, not the assignment.

Q. Then, on November 30, 1942, you acknowledged receipt of the following documents:

“1. Trade-mark registration to The Stuart Formula, No. 397611, dated September 8, 1942, issued by the United States Commissioner of Patents.”

A. Right.

Q. “2. Certificate of registration issued by the California Secretary of State to the trade-mark ‘The Stuart Formula’ under date of June 23, 1942, numbered 25736.”

A. I mean, those are the documents of which photostats form a part of Exhibit 15, but so that there will be no misunderstanding between you and me, counsel, we waited until 5-15-43, five months later, before we asked for an assignment.

Q. But on November 30, 1942, the originals of these documents were turned over to you and you acknowledged receipt of them?

A. That is right.

Mr. Maiden: I would like to ask this in evidence as Respondent’s exhibit next in order.

Mr. Mackay: No objection. [359]

The Court: It will be received in evidence as Respondent’s Exhibit N.

(Testimony of Robert H. Dunlap.)

(The document above referred to was received in evidence and marked Respondent's Exhibit N.)

Q. (By Mr. Maiden): Now, in your letter of April 15, 1943, I believe it is indicated that you enclosed some assignments of the trade-marks, that is, documents for the assignment of the trade-mark?

A. That is right. As I remember it—pardon me, you hadn't asked the question.

Q. I will ask you if you will look at this document I hand to you and see if that is a copy of the assignment as drawn up by you and enclosed with your letter of April 15, 1943.

A. I believe it to be the one. The reason I am hesitant about that one, Mr. Maiden, is this: I think there were two or perhaps three forms submitted, and modifications were requested by Mr. Wiseman. Whether this was the one that went with the first letter, I don't know. I assume that it was.

Q. This was not the assignment that was actually executed by The Vita-Food Corporation, was it?

A. I don't think so. I may be in error on that. It may have been. In any event, counsel, I did prepare that [360] particular instrument at some time. Whether that was the one that was finally signed, I don't know.

Q. Mr. Dunlap, I hand you here what purports to be a copy of an "Assignment of Trade-Mark" by The Vita-Food Corporation per Oscar Wiseman,

(Testimony of Robert H. Dunlap.)

and it appears to be sworn to on the 24th day of June, 1943, by Mr. Wiseman before a notary public. Would you be kind enough to read that over and see if that is the assignment you got from Vita-Food Corporation?

A. Yes, I am sure that this is the only one. My recollection is that there was one which was used for transmittal to Washington and another one which was used for transmittal to the Secretary of State. I may be in error on that. This is one of the assignments. Whether this is the only one, I don't know.

Q. Do you have the other assignments, if there are any that were actually executed by Vita-Food Corporation?

A. No, I don't. I looked for them, and I can't find them. I find in my files several revisions—the reason for my answer is this: I looked carefully through the files to be prepared to present the actual document that was executed. I can't find it. Where it is, I don't know.

Mr. Maiden: I would now like to offer in evidence this Assignment as Respondent's exhibit next in order.

Mr. Mackay: No objection.

The Clerk: Exhibit O. [361]

The Court: It is received as Exhibit O.

(The document above referred to was received in evidence and marked Respondent's Exhibit O.)

(Testimony of Robert H. Dunlap.)

Mr. Maiden: I would like to have marked for identification at this time as Respondent's Exhibit P, the unexecuted copy of "Assignment" which Mr. Dunlap sent to The Vita-Food Corporation in his letter of April 15, 1943.

The Court: It will be marked for identification as Exhibit P.

(The document above referred to was marked Respondent's Exhibit P for identification.)

The Witness: If you want me to, Mr. Maiden, I will be glad to explain the different language if you think it is material.

Mr. Mackay: I think the witness is entitled to explain his answer.

Mr. Maiden: I am sure, Mr. Mackay, you will bring that out. I want to move along if I may.

Q. (By Mr. Maiden): Now, Mr. Dunlap, did the contract of May 5, 1941, provide any penalty against The Stuart Company for non-performance of the contract, that is, for failure to purchase any of The Vita-Food Corporation's products?

A. Certainly.

Q. What was the penalty? [362]

A. In so many words in the contract, no.

Q. Well, would we find a penalty unless we found it within the four corners of the contract?

A. When you speak of penalty, are you using that technically or in the sense of liability?

Q. In the sense of liability.

A. It was my opinion that The Stuart Company

(Testimony of Robert H. Dunlap.)

was liable to Vita-Food Corporation for failure to purchase the quota requirement, and if they did not purchase the quota requirement in any one month, it was my belief and opinion that The Stuart Company was liable to Vita-Food Corporation for the difference between the amounts actually purchased and the amounts which they agreed to purchase.

Q. Will you please point out in the contract any such provision that would lead you to form such an opinion? A. Paragraph 6.

Q. Will you read paragraph 6 and point out the part of paragraph 6 that would make The Stuart Company liable for any damages upon its failure to purchase the concentrate from Vita-Food Corporation?

A. Pardon me, I want to change my answer. I am in error as far as the quotas are concerned. The corporation could not buy from anyone else.

Q. But the corporation was not bound to buy anything from Vita-Food Corporation? [363]

A. That is correct. If The Stuart Company stayed in business and sold vitamin concentrates, it had to buy all that it sold from The Vita-Food Corporation.

Q. Now, then, Mr. Dunlap, if you were so interested in getting out of this contract and if you had no interest in this trade-mark and would have paid nothing for it, why didn't you advise your client to simply not purchase any concentrates under this contract and thereby force Vita-Food

(Testimony of Robert H. Dunlap.)

Corporation to cancel the business arrangements altogether?

A. That question cannot be answered. If you mean by that, why didn't I advise The Stuart Company to go out of business, obviously that is unrealistic. They wanted to stay in business, but they couldn't—as long as they stayed in business they had to buy from Vita-Food. They couldn't buy from anyone else. Now, you say, force them to cancel. If they didn't buy from Vita-Food and bought from someone else, they would have immediately subjected themselves to liability from The Vita-Food Corporation, because they agreed to purchase only from Vita-Food.

Now, what you are suggesting, as I understand it, is that they could have gotten out of all of the obligations and duties under the contract simply by going out of business. Of course they could, that is true.

Q. Well, I am just wondering if it wouldn't have been cheaper to have taken that step and then organized a new [364] business than it was to pay \$197,700.00.

A. We figured it would cost us \$25,000.00 to start a new business.

Q. Did it cost you \$25,000.00 to start The Stuart Company off at the beginning?

A. It cost about—before they had any returns there was more than \$60,000.00 invested. I haven't fully answered that question, Mr. Maiden.

Q. Take your time.

(Testimony of Robert H. Dunlap.)

A. I would like to amplify my answer by saying this to you: The continuity of a business of this character is quite important. When you once build your detail organization, you have got to keep the thing rolling. Now, to disincorporate this company and start a new company would have not only been embarrassing to the company, but Mr. Hanisch was bound to continue to buy from The Vita-Food Corporation because the organization of a new company, in starting out fresh, would have been subject to the provisions of the contract of May 5, 1941, because you will notice that that contract binds anyone who succeeds to the business of The Stuart Company. Now, if we started a new company—if Mr. Hanisch started a new company, he would have succeeded to the business. He would have been charged with trying to succeed to the business of The Stuart Company and seeking to evade the provisions of the agreement. [365]

I would like to add this, also: You will notice by reference to Exhibit 15 that The Vita-Food Corporation took the position that The Stuart Company was Mr. Arthur Hanisch's alter ego and he was personally bound by the terms of the May—I am not going to say bound by the terms of the May 5th agreement, but whatever duties The Stuart Company had, it was the position of The Vita-Food Corporation that Mr. Hanisch was also bound.

Q. Is that provision expressed in the contract of May 5, 1941, that Mr. Hanisch is bound?

A. Yes, sir. This contract—paragraph 24—

(Testimony of Robert H. Dunlap.)

“This contract shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, and specifically, and without limiting the generality of the foregoing, this contract shall be binding upon any individual or partnership who succeeds to the business of either party hereto.”

What you are suggesting is that we should drop The Stuart Company, start a new concern, and do the same sort of thing, and that would have been succeeding to the business of The Stuart Company.

Q. That is according to your interpretation?

A. Exactly—according to the interpretation of The Vita-Food Company.

Q. According to your interpretation? [366]

Mr. Mackay: He has already answered.

Q. (By Mr. Maiden): Now, there is nothing in this contract that binds anybody except The Stuart Company to purchase materials from The Vita-Food Corporation, is there?

A. In paragraph 24, yes.

Q. Well, I am not talking about paragraph 24 now. I am asking you if there is any provision in this agreement of May 5, 1941, that provides that Mr. Hanisch is bound to buy products from Vita-Food Corporation.

A. Mr. Hanisch personally eo nomine? You mean by his specific designation “Arthur Hanisch” must buy from Vita-Food Corporation?

Q. Yes.

(Testimony of Robert H. Dunlap.)

A. No, not as long as The Stuart Company is; The Stuart Company makes the purchases.

Q. Now, we will say The Stuart Company goes out of business, dissolves and goes out of business, and you form the X Company with a different setup entirely, and for the purpose of carrying on the business of selling vitamins. Do you mean to tell this court that this contract of May 5, 1941, could have been invoked against that new corporation and that that new corporation would have been forced to buy all of its vitamin products from Vita-Food Corporation?

A. Now you tell me a different setup entirely. Will [367] you tell me what you mean by that, and I will answer your question.

Q. You know what I mean by it.

Mr. Mackay: The witness is entitled to understand the question.

Mr. Maiden: If he doesn't want to answer the question——

Mr. Mackay: He is trying to understand the question.

Mr. Maiden: Read the question.

(The question was read.)

Mr. Mackay: I submit, if your Honor please, that the witness is entitled to a clear question. It is a different setup entirely. What is meant by "with a different setup"?

Mr. Maiden: All right, I will eliminate "different setup."

The Court: The objection is sustained.

(Testimony of Robert H. Dunlap.)

Q. (By Mr. Maiden): Now, then, Mr. Dunlap, if you had dissolved The Stuart Company and formed a new corporation authorized to do business as a distributor or manufacturer of vitamin products, could this contract of May 5, 1941, have been invoked against the new corporation so as to prohibit this new corporation from buying any vitamin products except from Vita-Food [368] Corporation?

A. If Mr. Hanisch was not connected with the corporation, the assumed new corporation would, of course, not be bound. If Mr. Hanisch was connected with the corporation, I am quite certain that The Vita-Food Corporation would have sought to hold Mr. Hanisch personally liable and bound by the agreement of May 5, 1941.

Q. Now, Mr. Dunlap, what kind of a notice was that you served on The Vita-Food Corporation, I believe, on November 23, 1942? It is in evidence, but——

A. Notice of rescission of contract.

Q. Notice of rescission of contract?

A. That is a special California procedure. If you want to cancel a contract, you must give notice of rescission and you must offer to return everything you have received of value under the contract which you propose to cancel, provided the other party does likewise.

Q. Yes. Was that necessary before you could file a suit for that purpose?

A. It was, it was.

(Testimony of Robert H. Dunlap.)

Q. Now, Mr. Dunlap, I will ask you if it isn't a fact in this case that subsequent to October 12, 1942, which is the date of the acknowledgment by The Stuart Company of Vita-Food's cancellation, The Stuart Company didn't place two orders with The Vita-Food Corporation, being order [369] numbers 36 and 37, for purchases of the vitamin concentrate.

A. I think not only those two orders, but I think there were more than that.

Q. You think there were more than that?

A. I think there were more than that, that is correct.

Q. I believe you stated previously that you knew as of October 12, 1942, that the vitamin concentrate that the Vita-Foods had been furnishing you under the contract was an inferior product and was really a fraud. Is that the sense of your testimony on direct or cross-examination, if you recall?

Mr. Mackay: Just a moment.

Mr. Maiden: Just a second, I want to get my question in.

The Court: All right. He is through, Mr. Mackay. Have you any objection?

Mr. Mackay: If your Honor please, I think he is stating something that isn't in the record.

Mr. Maiden: Well, I am asking—

Mr. Mackay: Wait a minute, let me finish.

Mr. Maiden: Excuse me, Mr. Mackay.

Mr. Mackay: We are not claiming that the prod-

(Testimony of Robert H. Dunlap.)

uct itself was a fraud. We said it was not stable and not good, and all that, but the fraud the whole record shows relates to the representations that were made. Now, counsel is [370] inferring in the record that we are saying that we were putting out a fraudulent product. We admit, and our testimony shows, that we weren't getting the kind of product we expected to get, and we were trying to improve it, but we don't admit for one moment that The Stuart Company was putting out a fraudulent product, except with respect to where it says all the natural product, there.

The Court: Is that an objection to the question?

Mr. Mackay: Yes, I object.

The Court: The objection is sustained.

Mr. Maiden: If the Court please, I don't understand the basis of the Court's ruling. Could the question be reread?

The Court: The question is too broad, and is a question that supposes that there is testimony in the record which counsel for the Petitioner has stated is not in the record, and I think that he is correct, so I think you had better reframe your question. The reporter will read the question back to you if you wish.

Mr. Maiden: I don't care to pursue it, if the Court please.

Q. (By Mr. Maiden): Mr. Dunlap, referring again to the contract of May 5, 1941, and specifically to paragraph 24, to which you referred, I will ask you if it isn't a fact that paragraph 24 [371] would,

(Testimony of Robert H. Dunlap.)

of course, have been inoperative and have no force and effect in the event this contract had been canceled. A. In its entirety?

Q. Yes. A. That is right.

Q. I believe, under this agreement of November 28, 1942, that The Stuart Company completed its purchases of orders Nos. 35 and 37, is that correct, Mr. Dunlap, as you recall?

A. Yes, that is true, and I think, Mr. Maiden—although I am not certain—I think subsequent orders were placed. I think there may be one or two. I may be wrong.

Q. That product was sold by The Stuart Company? A. Oh, yes.

Mr. Maiden: I believe that is all, if the Court please.

The Court: Now, let me ask you one question about your exhibits. Exhibit M is the letter forwarding drafts of assignments of trade-marks; Exhibit O is a copy of "Assignment" and is executed by Mr. Wiseman; Exhibit P is a draft that is not executed. Now, just tell me again what was the reason for that?

The Witness: Exhibit P, your Honor—the reason for that?

The Court: No, what were you going to [372] say?

The Witness: Exhibit P, I believe to have been the document that was transmitted with the letter of April 15th, which is Exhibit M. The language in Exhibit P was not satisfactory to The Vita-Food

(Testimony of Robert H. Dunlap.)

Corporation, and therefore Exhibit O was prepared. In other words, Exhibit O was prepared after Exhibit P, and your Honor will notice that the second paragraph of Exhibit O is practically a direct quote from some of the provisions of Exhibit 12, the cancellation agreement.

The Court: That is all.

Redirect Examination

By Mr. Mackay:

Q. Now, Mr. Dunlap, I think on cross-examination you were asked why you did not file an answer to the injunction suit. Do you have an explanation to make of that now?

A. Yes. We wanted—I had dictated a revision of the complaint as a cross-complaint, and I had dictated an answer to the injunction action, or injunction suit. Before that dictation could be transcribed—it was only two days—as a matter of fact, it was only one day, because Thangsgiving was on a Thursday and our settlement conference took place on Friday—I believe the 27th was Friday—so there was only one day, actually one business day, between the service of the complaint and the reopening of the negotiations, and the negotiations were concluded the following morning.

Q. Now, I will ask you one more question, Mr. Dunlap. [373] I think you stated on direct examination that you made an offer to purchase the business of The Vita-Food Corporation.

A. That is correct.

Q. What did they say with respect to that?

(Testimony of Robert H. Dunlap.)

A. They said the business was not for sale, they had nothing for sale.

Mr. Maiden: Mr. Dunlap—

Mr. Mackay: May I ask one further question?

Q. (By Mr. Mackay): Prior to the contract of November 28, 1942, did you prepare any document or any application for cancellation of trade-mark?

A. I did.

Q. Will you examine this instrument and tell me whether that is the document you refer to?

A. That is correct.

Q. Did you file this with the Patent Office?

A. We did not because the settlement—it got out of the contract—we concluded our settlement and it got out of the contract before we filed it.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

The Court: I don't quite understand this, Mr. Mackay.

Mr. Mackay: This is merely an application [374] for cancellation of trade-mark, which was prepared but not filed. It just had something to do with that.

The Court: The cancellation of "the Stuart formula"?

Mr. Mackay: "The Stuart formula" trade-mark.

The Court: Prepared by whom?

Mr. Makay: Mr. Dunlap, on behalf of The Stuart Company.

The Court: About when was this supposed to have been prepared?

(Testimony of Robert H. Dunlap.)

The Witness: October, 1942. You will notice the date on the second page.

The Court: What is your idea in preparing it?

The Witness: This, your Honor: Our proposed complaint in the State of California would result in a decree adjudicating that we were the owner of the trade-mark. Registration is merely prima facie evidence of the ownership. The California decree would not clear the record in the Patent Office. Therefore it was necessary, in my opinion, to clear the record in the Patent Office as well as to get the decree of the California court rescinding the contract on the ground of fraud and adjudicating that The Stuart Company was and at all times had been the owner of the trade-mark after the expiration of one year from the first shipment in interstate commerce.

The Court: Did you prepare and were you going to [375] file an application for cancellation of the trade-mark with the Secretary of State of California?

The Witness: I had not prepared that, your Honor. I was going to do that also, but that would probably not have been necessary, because a favorable decree in the State court, a certified copy of that lodged with the Secretary of State of California would be recognized by the Secretary of State but not by the Commissioner of Patents.

Mr. Maiden: May I see that a moment?

The Court: That is the State Commissioner of Patents?

(Testimony of Robert H. Dunlap.)

The Witness: The Secretary of State, your Honor.

The Court: The Secretary of State, but not by the Commissioner of Patents. What Commissioner of Patents?

The Witness: The United States Commissioner of Patents. If I may, I will illustrate the point, your Honor. Your Honor will notice that there is, both in Exhibit P and Exhibit O, a reference to good will, to the good will of the business in connection with which the trade-mark had been used. The Commissioner will not accept an assignment unless good will is in there, for the reason that you cannot assign a trade-mark unless you assign it in connection with good will. You can't assign a trade-mark in gross, it isn't that kind of property.

Mr. Maiden: If the Court please, I doubt [376] the admissibility of this exhibit on several grounds. It is admitted it was never filed. It could be considered to be in the nature of a self-serving declaration, but I believe that it wouldn't be remiss if the Court received it in evidence, and I am not going to object to it, but I can see some grounds that would probably make this inadmissible.

The Court: It is received as Exhibit No. 17.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 17.)

Mr. Mackay: Now, I have one more question and that is all.

Q. (By Mr. Mackay): Mr. Dunlap, you were asked by counsel, if you were not tax-conscious, and

(Testimony of Robert H. Dunlap.)

I think in effect he asked if you had not drafted this contract in such a way as to help you in taxes. I will ask you if this agreement was drawn with the idea of reflecting the real intent of the parties in settling the disputes and the cancellation of the contract as referred to therein.

A. Exactly, exactly in accordance with our intentions. May I amplify that, Mr. Mackay?

Q. Yes.

A. If I wanted to paint a picture for tax purposes, it would have been a very simple thing for tax purposes to put a value of \$5,000.00 or \$10,000.00 on the assignment of the [377] trade-mark.

Recross-Examination

By Mr. Maiden:

Q. That is, if that had been agreeable with Vita-Food Corporation. You would have had to obtain their agreement to such a document, wouldn't you, Mr. Dunlap?

A. I haven't the slightest doubt in the world it would have been entirely acceptable. What they were interested in was \$200,000.00.

Q. In other words, the Vita-Food Corporation would have signed any type of agreement that you had written up and drafted for the purposes set forth in the agreement?

A. Any type—I wouldn't say that. If I put in there—for instance, if I put this on the basis that they had admitted they had been guilty of a

(Testimony of Robert H. Dunlap.)

fraudulent representation and the contract was therefore cancelled, I don't think they would have signed that, no. I am using that as an illustration.

Q. Well, how many drafts of this agreement of November 28, 1942, were actually prepared before you arrived at your final document?

A. I think it was written and rewritten all night long. I think we had at least four different variations.

Q. Well, why was it necessary to have so many variations of the agreement if anything you drafted would be [378] satisfactory to Vita-Food representatives?

A. For this reason: The principal discussion was as to tying Mr. Hanisch up until October 15, 1946, prohibiting him from selling any of his stock, prohibiting him from doing any other business, of agreeing to devote his attention exclusively to the actions of this company. That was what we were arguing about mostly.

Q. Now, isn't it a fact that in these discussions the substance of the transaction was that Vita-Food was selling you a trade-mark and that the entire consideration set forth in the agreement was for the purpose of acquiring that trade-mark from Vita-Food?

A. That statement is absolutely contrary to what the substance was. Let me amplify that. You will notice that attached to Exhibit 15 is the notice of cancellation of contract dated October 8th. You

(Testimony of Robert H. Dunlap.)

will notice on October 12th we acknowledged notice of termination of contract——

Mr. Maiden: Now, just a minute. I don't want this answer because he is arguing the case. He is taking facts and putting them together and drawing inferences from them, and I don't want the answer, and move it be stricken.

The Court: The part is stricken beginning with the witness' statement, "Let me amplify my answer."

Mr. Maiden: I believe that is all, if the Court please. [379]

Mr. Mackay: I think that is all.

The Court: You may step down.

(Witness excused.)



